Supreme Court, U.S.
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NO. 011451

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

SHIRLEY COLLETTI, A.G.E. ENTERPRISES, INC., and A.G.E. CORPORATION , INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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I. QUESTION PRESENTED FOR REVIEW

Where a federal indictment charges a defendant with wire fraud (18 U.S.C. § 1343) and racketeering based on said wire fraud (18 U.S.C. § 1962(c)), and alleges as the required manner and means that the defendant engaged in two separate, independent fraudulent schemes per count, but one of those schemes is a statutory offense which is not fraudulent as a matter of law and the government presents evidence of both schemes at trial, does Stirone v. United States, 361 U.S. 212 (1960), Russell v. United States, 369 U.S. 749 (1962), and Kotteakos v. United States, 328 U.S. 750 (1946) on the one hand, or United States v. Miller, 471 U.S. 130 (1985), on the other, govern whether the appellate court on review may, consistent with the Fifth and Sixth Amendments to the United States Constitution, strike the legally deficient scheme from the indictment and uphold the conviction based on the legally sufficient scheme?

II. NAME OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Shirley Colletti, now known as Shirley Miltenberger, Petitioner; A.G.E. Enterprises, Inc. and A.G.E. Corporation, Inc., (hereinafter "A.G.E.") Joint Petitioners (See: U.S. Sup.Ct. Rule 12.4); and the United States of America, Respondent. The ownership of the A.G.E. corporations is a **key** factual dispute in this case. Petitioners contend that the owners are Eduardo Neves, Agostino Conforte, and Emmanuel Noe. The government contends that the A.G.E. corporations are alter egos/shells for Joseph Conforte.

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III. CITES OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED

United States of America v. Shirley Colletti, A.G.E. Enterprises, Inc. and A.G.E. Corporation, Inc., Unpublished Memorandum, United States Court of Appeals in and for the Ninth Circuit, Case No. 00-10195, June 29, 2001.

IV. STATEMENT OF BASIS OF JURISDICTION

This is an Application for *Certiorari* from the United States Court of Appeals for the Ninth Circuit.

Mrs. Colletti and A.G.E. were charged by a Superceding Criminal Indictment, with 21 counts of wire fraud, and with racketeering and conspiracy to participate in an enterprise through a pattern of racketeering, based upon the alleged wire fraud counts. Mrs. Colletti and A.G.E.'s trial attorneys filed a Motion to Dismiss the Superceding Indictment on the grounds that the indictment alleged a scheme of bankruptcy fraud which could not legally be so, which was denied. The matter went to a jury trial, and all of the Defendants were found guilty, although Mrs. Colletti was found not guilty on 12 of the wire fraud counts. Mrs. Colletti received a 46-month term of imprisonment under the United States Sentencing Guidelines. A.G.E. was fined and effectively forfeited to the U.S. Government.

On appeal, Mrs. Colletti and A.G.E. , in separate

briefs, raised the common assignment that the Superceding Criminal Indictment failed to allege a prosecutable offense. The Ninth Circuit, in an unpublished memorandum disposition, filed June 29, 2001, rejected all of the assignments of error and upheld the convictions and sentences. All Appellants timely filed Petitions for Rehearing and Suggestions for Rehearing *en banc*. The United States Court of Appeals for the Ninth Circuit finally denied the Petitions on October 10, 2001.

This Petition has been filed within 90 days of the final Order Denying Rehearing with an additional grant of 60 days. Therefore, this Court has jurisdiction to hear this Petition pursuant to 28 U.S.C. § 2101(d) and U.S. Sup. Ct. Rule 13.1 and 13.3.

Per U.S. Sup. Ct. Rule 10(a) and (c), we contend that this Court should grant *Certiorari* because a federal court of the last resort, the United States Court of Appeals for the Ninth Circuit, has decided an important federal constitutional question (by omission) which has not been, but should be, settled by this Court; and the lower federal courts appear to be in decisional conflict regarding the issue.

V. FEDERAL LAW INVOLVED

The Fifth Amendment to the United States Constitution states in *pari materia*:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except

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shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

The court on motion of the defendant may strike surplusage from the indictment or information.

Federal Rule of Criminal Procedure, Rule 8(a), states in part material:

"Two or more offenses may be charged in the same indictment . . . in a separate count for each offense. . . ."

VI. STATEMENT OF FACTS

On November 1, 1995, the Grand Jury for the United States District Court, District of Nevada, returned a four-count criminal indictment against Joseph Conforte and Peter A. Perry. These two were charged with Bankruptcy Fraud (18 U.S.C. § 152), Wire Fraud (18 U.S.C. § 1343) and Aiding and Abetting (18 U.S.C. § 2). These Petitioners, Shirley Colletti and A.G.E., were not named or referenced **anywhere** in the original Indictment.

After his arrest, Peter Perry cooperated with the government and, as a result of his cooperation, the Grand Jury for the United States District Court, in and for the District of Nevada, returned a Superceding Criminal Indictment on August 5, 1998.

Counts One through Four of the Superceding Criminal Indictment read identically to Counts One through Four of the original Indictment. Mrs. Colletti was charged in Counts Eight through Twenty-eight with wire fraud and aiding and abetting, along with Joseph Conforte, Joanne Olcese, Eduardo Neves, A.G.E. Corporation, Inc. and A.G.E. Enterprises, Inc.. Based upon the separate acts of wire fraud, the Petitioners were

also charged with racketeering and conspiracy to engage in racketeering, Counts Thirty and Thirty-one.

Because this Petition centers on precisely how Mrs. Colletti and A.G.E. were charged, it is necessary to look carefully at the Superceding Criminal Indictment. Counts Eight through Twenty-eight were alleged in one general pleading. The general pleading began:

A. **INTRODUCTION**

The Grand Jury re-alleges and incorporates §§ A, B and C of Count Four, as though fully set forth herein."

However, § A of Count Four began with the words:

A. **INTRODUCTION**

The Grand Jury re-alleges and incorporates paragraphs 1 through 10, Count One, as though fully set forth herein."

Thus, doing the necessary "cutting and pasting," the charging document against Mrs. Colletti and A.G.E. reads as set follows:

At all times relevant to this Indictment:

1. Defendants **JOSEPH CONFORTE** and **SALLY CONFORTE** owned and operated a legal brothel known as the Mustang Ranch, located in Mustang, Nevada.

2. Peter A. Barry was an attorney licensed to practice law in the state of Nevada and represented Defendant **JOSEPH CONFORTE**.

3. On September 10, 1982, **JOSEPH CONFORTE** opened an account at the Discount Bank and Trust Company in Geneva, Switzerland (Discount Bank), No. 76206, in the name of Jose C. Montoya. Defendant **JOSEPH CONFORTE** solely controlled this account and made and caused to be made numerous deposits and withdrawals from this account.

4. On November 24, 1982, Defendant **JOSEPH CONFORTE** quitclaimed his interest in certain real property known as the Mustang Ranch to his wife, Sally Conforte.

5. On November 26, 1982, Sally Conforte filed a Chapter 11 Bankruptcy Petition, Case No. 82-966 (Sally Conforte Bankruptcy) in the United States Bankruptcy Court for the District of Nevada (Bankruptcy Court). The Internal Revenue Service was the major creditor.

6. On January 24, 1985, Sally Conforte quitclaimed back to herself and to Defendant **JOSEPH CONFORTE**, certain real property known as the Mustang Ranch, subject to the Order Confirming Plan in the Sally Conforte Bankruptcy, said Order dated February 15, 1984.

7. On September 18, 1990, the Sally

Conforte bankruptcy was converted into a liquidation proceeding under Chapter 7. A bankruptcy trustee was appointed to liquidate the assets to pay the debtor's creditors.

8. On September 18, 1990, Defendant **JOSEPH CONFORTE**, filed a Chapter 11 Bankruptcy Petition, Case No. 90-1331 (Joseph Conforte Bankruptcy) in the United States Bankruptcy Court for the District of Nevada. The Internal Revenue Service was the major creditor. Peter A. Perry initially represented Defendant **JOSEPH CONFORTE** in the filing of said Petition.

9. On February 5, 1991, the Joseph Conforte Bankruptcy was dismissed.

10. On May 6, 1992, the Sally Conforte Bankruptcy was dismissed.

B. **PURPOSE OF THE SCHEME AND ARTIFICE**

From on or about September 18, 1990, and continuing until at least May 6, 1992, Defendant **JOSEPH CONFORTE** and Peter A. Perry, devised and intended to devise a scheme and artifice to defraud the Internal Revenue Service of and concerning property known as the Mustang Ranch.

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C. **THE SCHEME AND ARTIFICE**

1. It was part of the scheme and artifice that the Defendant would file and did file a Chapter 11 Bankruptcy Petition, Case No. BK-N-90-1331-JHT (Joseph Conforte Bankruptcy) in the United States District Court for the District of Nevada (Bankruptcy Court).

2. It was a part of the scheme and artifice that the Defendant knowingly and intentionally failed to file a Statement of Assets in said Petition.

3. It was a part of the scheme and artifice that the Defendant filed pleadings in the Joseph Conforte Bankruptcy and in the Sally Conforte Bankruptcy, claiming that **JOSEPH CONFORTE** had no interest in Mustang Properties, Inc., the prospective purchaser of the property known as the Mustang Ranch.

4. It was a part of the scheme and artifice that the account at Discount Bank was concealed from the trustee and creditors of the Sally Conforte Bankruptcy.

5. It was a part of the scheme and artifice that on or about August 14, 1990, the Defendant caused to be transferred approximately $800,000 from the Discount Bank and Trust Company in Geneva, Switzerland to Peter Perry, care of Mustang Properties, Inc. at the Valley Bank of Nevada, Reno, Nevada, Account No. 323179160.

6. It was part of the scheme and artifice that on or about November 30, 1990, the Defendant caused to be transferred approximately $1,000,000 from the Discount Bank and Trust Company in Geneva, Switzerland to Peter Perry, care of Mustang Properties, Inc. at the Valley Bank of Nevada, Reno, Nevada, Account No. 323179160.

7. It was part of a scheme and artifice that on or about November 13, 1990, Peter Perry purchased the property known as the Mustang Ranch on behalf of Mustang Properties, Incorporated, using funds transferred from the account at Discount Bank and Trust Company in Geneva, Switzerland.

B. **PURPOSE OF THE SCHEME AND ARTIFICE**

From on or about September 18, 1990, and continuing to at least May 6, 1992, Defendants **JOSEPH CONFORTE, SHIRLEY COLLETTI, JOANN OLCESE, EDUARDO NEVES, A.G.E. ENTERPRISES, INC., A.G.E. CORPORATION, INC.,** and others known and unknown to the Grand Jury, devised and intended to devise a scheme and artifice to defraud the Internal Revenue Service.

C. **THE SCHEME AND ARTIFICE**

1. It was part of the scheme and artifice

that beginning in or about October 1991, Defendant **JOSEPH CONFORTE** directed that Mustang Properties, Inc. was to be sold, and that Peter Perry was to fly to Italy to meet the buyers, when in truth and in fact the buyers would knowingly be acting at the direction of and for the benefit of Defendant **JOSEPH CONFORTE** in order that he may receive income from the operation of the brothel known as the Mustang Ranch, without having to report said income to the Internal Revenue Service, and to prevent the Internal Revenue Service from seizing the brothel as the property of Defendant **JOSEPH CONFORTE**.

2. It was part of the scheme and artifice that Perry was to meet in Italy with Augustino [sic] Conforte, a dentist and nephew of Defendant **JOSEPH CONFORTE**, who was to be a 70 percent stakeholder in the new company, a surgeon by the name of Giovanni, who was to be a 10 percent stakeholder, and a shipbuilder by the name Emanuela [sic] Noe, the father-in-law to Augustino [sic], who was to be a 10 percent stakeholder. Peter Perry was to be the remaining 10 percent stakeholder.

3. It was part of the scheme and artifice that the initials of the first names of the three persons Peter Perry met in Italy would be the basis of the successor corporate name, A.G.E., which corporation was to be the recipient of all of the properties and income of Mustang Properties, Inc.

4. It was part of the scheme and artifice that Defendant **EDUARDO NEVES,** a retired Varig Airlines employee, would replace Giovanni, and would hold as much as 84 percent of A.G.E. through a British based holding company called Portman [sic] Computers, Ltd.

5. It was part of the scheme and artifice that the sale of Mustang Properties was to be in consideration of $3.85 million in Bazil [sic], Switzerland.

6. It was part of the scheme and artifice that no money would actually be exchanged. Instead, Defendant **JOSEPH CONFORTE** caused to be shown to the Swiss notaries who were to witness the transaction, and who worked for an escrow company named VonSury, a fake bankroll.

7. It was part of the scheme and artifice that the fake bankroll was created by Defendant **JOSEPH CONFORTE**, withdrawing approximately $1,000,000 which he had deposited into his Swiss account at Discount Bank and placing the real Swiss paper money on top of bundles of regular paper. These bundles were then wrapped in cellophane.

8. It was part of the scheme and artifice that the Swiss notaries were told that there was no need to count the money as Peter Perry, representing Mustang Properties, Inc., was present and assured them that all the money was there.

Defendant **EDUARDO NEVES** posed as the buyer representing A.G.E.. The sale was then completed.

9. It was further part of the scheme and artifice that, at the direction of **JOSEPH CONFORTE**, Defendant herein, and others acting under his supervision and control, monies from A.G.E.'s accounts in the United States would be wired to accounts under the name of Mygrange Ltd., which monies would then be distributed, through a series of off shore corporate accounts, for the use and benefit of Defendant **JOSEPH CONFORTE**, and that monies from A.E.G. [sic] accounts made payable to Defendant **SHIRLEY COLLETTI**, as noted below, would inure to the benefit of Defendant **JOSEPH CONFORTE**.

D. **THE WIRE COMMUNICATION**

On or about the dates, and in the amounts, listed below, in the District of Nevada and elsewhere, **JOSEPH CONFORTE, SHIRLEY COLLETTI, JOANN OLCESE, EDUARDO NEVES, A.G.E. CORPORATION, INC., and A.G.E. ENTERPRISES, INC.,** Defendants herein, and others acting at their direction and under their control, for the purpose of executing and attempting to execute a scheme and artifice to defraud, and for obtaining property by means of false and fraudulent pretenses, representations and promises, did transmit and cause to be transmitted in interstate and foreign commerce, by means of wire, radio or television communication,

certain signs, signals, pictures or sounds for the purpose of executing such scheme and artifice, to wit:

Count	**Date**	**Amount**
8)	08/04/93	$580,000
9)	08/05/93	$ 43,000
10)	09/21/93	$180,000
11)	10/21/93	$150,000
12)	10/25/93	$ 30,000
13)	12/29/93	$ 90,000
14)	02/03/94	$180,000
15)	05/06/94	$ 270,000
16)	07/14/94	$ 180,000
17)	09/09/94	$360,000
18)	10/21/94	$200,000
19)	11/18/94	$200,000
20)	06/16/95	$100,000
21)	08/18/95	$300,000
22)	09/08/95	$ 60,000
23)	09/22/95	$400,000
24)	10/02/95	$ 5,000
25)	02/23/96	$200,000
26)	04/01/96	$200,000

Mrs. Colletti and A.G.E. argued to the United States Court of Appeals for the Ninth Circuit that this Indictment failed to state a prosecutable claim, because it charged them in material part with wire fraud, with a scheme and artifice being bankruptcy fraud; but under the pleaded facts, no bankruptcy fraud could **legally** have occurred. In rejecting this contention, the United

States Court of Appeals for the Ninth Circuit stated as follows:

A. *Bankruptcy Fraud Not Necessary for Wire Fraud Convictions*

The superceding Indictment is very specific with respect to the wire fraud charged in Counts Eight through Twenty-eight. Although those counts incorporate by reference the factual allegations of Count Four, which details Joseph Conforte's ("Conforte") use of the wires to commit bankruptcy fraud, the counts also allege a separate scheme to defraud the I.R.S., including specific details as to Appellant's involvement in the scheme. For example, the Indictment describes how A.G.E. was created solely to hide Conforte's Mustang Ranch income from the I.R.S.. The Superceding Indictment alleges that the Defendants, including **COLLETTI**, would, under Conforte's directions, wire money from A.G.E.'s accounts in the United States to foreign accounts for Conforte's ultimate use and benefit, and would cause money to be drawn from A.G.E.'s accounts in amounts payable to **COLLETTI** that would ultimately be transferred to Conforte's control. Finally, the Indictment identifies 21 specific uses of the wires by date, amount and payee. These allegations, if proven, would satisfy the fraud element required for a wire fraud conviction regardless of the disposition of the bankruptcy fraud charged in other counts. See: United States v. Garlick, 240 F.3d 789, 792 (9th Cir. 2001) (wire

fraud has three elements (1) a scheme to defraud, (2) use of the wires in furtherance of the scheme, and (3) a specific intent to deceive or defraud). According, the disposition of Counts One through Three was inconsequential to the wire fraud charges on which appellants were convicted.

The same is true with respect to the RICO counts. The Superceding Indictment proposes the 21 incidences of wire fraud as well as monthly bribery payments to the Storey County Commissioner and Storey County Sheriff as predicate X which support the Rico charges.[1] The Superceding Indictment also describes the purpose of the enterprise as "generating, collecting, receiving and holding income, whether reported or unreported to the Internal Revenue Service, from the property known as the Mustang Ranch, and by illegally distributing said income to Defendant Joseph Conforte.

These statements demonstrate the proof of the RICO counts, at least with respect to Appellants, did not rest upon proof of the bankruptcy fraud charges in Counts One through Three.

Mrs. Colletti's Petition for Rehearing and/or Suggestion for Rehearing *en banc* joined in the Petition for Rehearing and/or Suggestion for Rehearing *en banc*

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[1]The Ninth Circuit had neglected to note that during trial, the bribery allegations were dismissed as not proven.

filed by the A.G.E. Appellants. At pages 17-20 of the A.G.E. Appellants' Petition for Rehearing, they noted that the unpublished opinion seemed to assume that the bankruptcy counts should have been dismissed, and argued that the bankruptcy fraud counts in fact were not separable from the wire fraud counts as a matter of law.

VII. REASONS FOR GRANTING THE WRIT

The issue raised herein occurs all too commonly in the lower federal courts, and therefore needs to be reviewed: consistent with the Fifth and Sixth Amendments and F.R.Cr.P. Rules 7(c) and 8(a), how far backwards is this Court going to allow the lower courts to bend over, to save convictions for the government with respect to imperfectly plead indictments which are never amended pre-trial? The government here is effectively asking this Honorable Court to authorize duplicitous indictments and multiple conspiracies, without amendments or limiting instructions.

Because of the "cutting and pasting" referenced above, the superseding indictment alleges or references two schemes per count, which independently are in and of themselves offenses against the U.S. government: First, that in the late 1980's and 1990, Perry and Conforte conspired to deprive the I.R.S. via bankruptcy fraud of its ability to collect the assessed taxes against Conforte by lying to the bankruptcy court, in order to hide the true ownership of Mustang Properties, Inc., and failing to file the appropriate schedules in Conforte's Chapter 11 Bankruptcy so as not to enable the I.R.S. to have notice of the true ownership of Mustang Properties, Inc., before the

sale of the ranch to Mustang Properties, Inc.; and secondly, Perry and Conforte conspired thereafter to disenable the I.R.S. from collecting its remaining assessed tax owed by Conforte, by creating the ownership entities of A.G.E. of the brothel, which in fact were the alter egos of Joseph Conforte.

From the trial evidence, it is quite clear why Shirley Colletti and A.G.E. were not original defendants in this case; they had nothing whatsoever to do with either Sally or Joseph Conforte's bankruptcies, and were not in any way in on the planning of "Mustang Properties, Inc.." In fact, Mrs. Colletti was not even working at the Mustang Ranch during the time frame of Perry's bankruptcy fraud. She also had nothing whatsoever to do with the formation of either A.G.E. entity or its various predecessors-in-interest, holding companies, or "shells." However, the superceding indictment realleged and reincorporated the bankruptcy fraud throughout all of its counts, including the counts pertaining to Mrs. Colletti and A.G.E., and also alleged wire fraud based on the events of 1993-1996, executing the separate scheme of 1991-1992.

The central point we made to the Ninth Circuit Court of Appeals is not now seriously in dispute: if Mrs. Colletti and A.G.E. are allegedly part and parcel of the bankruptcy fraud scheme, as is alleged throughout the wire fraud and racketeering counts, then they have committed no crime on that theory, because there wasn't any legally cognizable bankruptcy fraud perpetrated either by Joseph Conforte or by Shirley Colletti. That is so for the following reasons:

1. The *prima facie* elements of bankruptcy fraud under 18 U.S.C. § 152 are that the individual or corporation is adjudicated bankrupt, and that the defendant conceals or aids or abets the concealment of the bankrupt's assets from the bankruptcy trustee. United States v. Giuliano, 644 F.2d 85, 87 (2d Cir. 1981). That is, § 152 prohibits false statements and concealment or transfer of assets; no more and no less. United States v. Key, 859 F.2d 1257, 1260 (7th Cir. 1988). But, for there to have been a concealment constituting a crime under 18 U.S.C. § 152, a defendant must have been required to disclose his assets through the filing of his schedules and statement of affairs. Where there is no duty to disclose, there is no concealment. 1 Collier on Bankruptcy, § 7.02[1][a][p. 7-23 (15th Ed.Rev.)] Thus, the offense of concealment under § 152 does not arise until there is a duty to reveal or disclose. Edwards v. United States, 265 F.2d 302, 306 (9th Cir. 1959)(reversal of conviction). But, per 11 U.S.C. § 521(1) and Rule 1007(b) of the *Federal Rules of Bankruptcy Procedure*, the bankruptcy court has the authority to extend the time for a debtor to file his schedules, or to relieve him entirely from that duty upon dismissal of the case. See also: 11 U.S.C. § 105. The normal remedy for failure to file schedules in an ongoing bankruptcy proceeding is dismissal of the case. 4 Collier on Bankruptcy, ¶ 521.09[1], p. 521-13 (15th Ed.Rev.); 11 U.S.C. § 1112(b)(3).

In short, Joseph Conforte could not have legally committed bankruptcy fraud by failing to file schedules in a Chapter 11 proceeding, because he had no absolute legal duty to do so. The fact that he "suffered" a dismissal of his Chapter 11 Petition by reason of failing to file

schedules simply means that the I.R.S. was free to execute on its judgment or lien in the ordinary course.

2. Abandonment of a bankruptcy estate properly constitutes a divestiture of all of the estate's interest in the abandoned property, pursuant to 11 U.S.C. § 554. Once property is abandoned, the abandonment becomes irrevocable. In Re: Gibson, 318 B.R. 900, 904 (E.D. Ark. 1984); In Re: Bryson, 53 B.R. 3, 4 (M.D. Tenn. 1985); 3 Collier on Bankruptcy, 5th Ed. § 554.02[3]. Upon abandonment by the estate, the property reverts to the party with possessory interest thereof. In Re: Wilson, 94 B.R. 886, 888 (E.D. Pa. 1989), and cases cited therein.

In short, once the Chapter 7 Trustee voluntarily abandoned the income of the brothel in 1990,[2] that income reverted to the "lawful owner." Under the government's theory of this case, that lawful owner was Joseph Conforte. Since Conforte legally cannot defraud himself, he committed no fraud. Since he committed no fraud, Mrs. Colletti could not have aided and abetted him in said "fraud."

3. Mrs. Colletti could not have aided and abetted the bankruptcy fraud in 1990 by sending money to an offshore holding company in the mid 1980's. A defendant who helps in disposing of stolen property after a theft has occurred is an accessory after the fact, and

[2]Although this fact was not alleged in the Superseding Indictment, it is judicially noticeable. See: Conforte v. United States, 979 F.2d 1375, 1376-77 (9th Cir. 1993). Additionally, this evidence was adduced at trial.

cannot be convicted as an aider and abettor in that theft. United States v. Barelli, 407 F.2d 735, 749 (7th Cir. 1969), citing Bollenbach v. United States, 326 U.S. 607, 611. Moreover, one cannot be convicted of aiding and abetting an act which is not illegal. Shuttlesworth v. City of Birmingham, 373 U.S. 262, 265. In other words, Mrs. Colletti legally cannot have aided and abetted in 1995 a bankruptcy fraud that occurred in 1990, particularly where no bankruptcy fraud as defined occurred in 1990.

The government's answering brief was essentially devoted to a traverse of these points. However, the Ninth Circuit seemed to assume in its disposition that the bankruptcy counts should have been dismissed, but that there was no prejudice to the Petitioners because of the rest of the counts in the indictment could be treated as though they were separable from Counts One through Three. The Ninth Circuit summarily so concluded, notwithstanding the fact that the government spent a substantial amount of time at the trial presenting witnesses and documents relevant only to the bankruptcy fraud counts.

In Stirone v. United States, 361 U.S. 212 (1960), this Court held that the defendant's Fifth Amendment rights were implicated, where the indictment charged the defendant with violating the Hobbs Act by making threats with respect to importation of sand and other materials from other states, but the jury was charged that the defendant's guilt could rest on a different theory. That is, there was a constructive amendment of the indictment with respect to different theories of the *prima facie* element of interference with interstate commence.

Following Stirone, this Court reached the same basic result in Russell v. United States, 369 U.S. 749 (1962). The factual context of Russell was a prosecution for refusal to answer questions when summoned before a Congressional Sub-committee. The indictment technically did not state an offense.

First, this Court noted the emphasis of two of the protections which an indictment is intended to guarantee: First, whether the indictment contains the elements of the offense intended to be charged, and [therefore] sufficiently apprises the defendant of what he must be prepared to meet; and secondly, in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Russell, 369 U.S. at 763-64 and cases cited therein. This Court further noted in Russell that a cryptic form of indictment requires that the defendant to go to trial with the chief issue undefined, and **enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution a free hand on appeal to fill in the gaps of proof by surmise or conjecture**. Russell, 369 U.S. at 766.

This Court made clear in Russell that these rules transcended the Federal Rules of Criminal Procedure, Rule 7. This Court noted that to allow the prosecutor or the Court to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment deprives the defendant of a basic protection which the [Fifth Amendment] guarantee of the

intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. Russell, 369 U.S. at 770. This Court went on to explain:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment via grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says: 'No person shall be held to answer,' may be frittered away until its value is almost destroyed. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court of prosecuting attorneys; or if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restrictions which the constitution places upon the power of the court in regard to the prerequisite of an indictment, in reality no longer exists.

Russell, 369 U.S. at 770-71.

Since Federal Practice and Procedure was first

authored in 1969 by Professor Charles Alan Wright, he has made the following comments regarding F.R.Cr.P. Rules 7 and 8:

> A similar analysis is in order if the question is whether a statute creates several offenses or merely describes ways and means by which a single offense may be committed. Rule 7(c) permits allegations in a single count that [a] defendant committed an offense by one or more specified means. Accordingly, if the statute is read as creating a single offense involving a multiplicity of ways and means of action and procedure, the charge can be laid in a single count, and indeed the use of several counts would involve multiplicity. But, if the statute includes several different offenses, to charge them in a single count would be duplicitous.

Wright, Federal Practice & Procedure: Criminal 3d, § 142.

> On that test, this is clearly a duplicitous indictment. It alleges in each count involving Petitioners multiple schemes, not overlapping, occurring in separate time frames, each involving a different cast of "players," and each involving different statutory violations of the United States Code. Normally, such an indictment is not considered to be "harmless error," when the count itself is not severed or amended, and when evidence as to both offenses contained within the same count is presented. See: United States v.

Tanner, 471 F.2d 128, 139 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972); United States v. Gibson, 310 F.2d 79,80 n.1 (2d Cir. 1962); United States v. Warner, 428 F.2d 730, 735 (8th Cir.), *cert. denied*, 400 U.S. 930 (1970); cases cited at Wright at n.16.

Professor Wright goes on to explain:

> The vice of duplicity is that there is no way in which the jury can convict on one offense and acquit on another offense contained in the same court. A general verdict of guilty will not reveal whether the jury found the defendant guilty of one crime and not guilty of the others, or guilty of all. It is conceivable that this could prejudice defendant in sentencing, **in obtaining appellate review**, and in protecting against double jeopardy.

Wright, *Id., § 142.*

This observation, of course, is completely consistent with Russell. Moreover, Professor Wright cites to United States v. Kearney, 451 F.Supp. 33, 35 (S.D.N.Y., 1978) and cases cited therein for the proposition that the prohibition against duplicity has its constitutional underpinnings both in the Fifth and the Sixth Amendments. See also: United States v. Morse, 785 F.2d 771, 774 (9th Cir. 1986) [duplicitous indictments may prevent jurors from acquitting on a particular charge by allowing them to convict on another charge that is improperly lumped together with another offense in a single count. Where such a situation occurs,

it is impossible to determine whether all 12 jurors unanimously agreed that the defendant committed either of the separate offenses contained within the duplicitous count.]

After the 1960's, however, this Honorable Court distinguished and clarified Russell in a series of cases. In Handling v. United States, 418 U.S. 87, 119-20 (1974), this Court clarified Russell to mean that an indictment can set forth the offense in the words of the statute, so long as those words set forth the elements necessary to constitute the offense intended to be punished. An indictment need not set forth words which further define a legal term of art. A legal term of art is sufficiently definite in legal meaning to give a defendant notice of the charge against him.

Of course, Handling would not apply to this situation, in light of United States v. Hess, 124 U.S. 483, 488-89 (1888).

Significantly, this Court handed down United States v. Miller, 471 U.S. 130, (1985). Miller held that as long as the crime and elements of the offense are fully and clearly set forth in the indictment, the defendant's Fifth Amendment rights are not normally violated by the fact that the indictment alleges alternate means of committing the same crime which are not legally or factually provable. It does not constitute an unconstitutional amendment to an indictment to drop allegations which are unnecessary to an offense that is clearly contained within it. Miller, 471 U.S. at 144-45.

We submit that this Court did not intend to limit Russell very severely in Miller. At 471 U.S. at 134-35, this Court in Miller cited to Kotteakos v. United States, 328 U.S. 750 (1946) and Berger v. United States, 295 U.S. 78 (1935) for at least the implied proposition that if facts proven at trial conform to only one of the "manner and means" theories of 18 U.S.C. § 1341 alleged in the indictment, the Miller result might nevertheless be different if a showing could be made that the variance prejudiced the fairness of the defendant's trial in some other way. In other words, an uncorrected but fully proven duplicitous indictment, and/or one that charges multiple conspiracies, falls within Russell, not Miller.

We submit that that is a critical distinction in this case that directly bears on the issue at hand.

Among the lower courts, the government can point to United States v. Kuna, 764 F.2d 813, 817-18 (7th Cir. 1985) and United States v. Begaud, 783 F.2d 144, 147-48 (8th Cir. 1986) as consistent with what the Ninth Circuit did in this case. Petitioners, on the other hand, can point to United States v. Adkinson, 135 F.3d 1363, 1367 (11th Cir. 1998), amended on other grounds, 158 F.3d 1147 (11th Cir. 1998) and United States v. Santa-Manzano, 842 F.2d 1, 3 (1st Cir. 1988) [Cir. J. Breyer, presiding] as inconsistent with what the Ninth Circuit did here.

It would appear that the case most similar to this one is United States v. Camiel, 519 F. Supp. 1238 (E.D.Pa. 1981), affirmed, 689 F.2d 31 (3d Cir 1982).

In Camiel, the indictment charged multiple defendants with engaging in a single mail fraud scheme, but the evidence revealed multiple schemes. In granting the motion for judgment of acquittal, the district court held that it was impossible for the jury to determine which evidence applied to which defendant, and accordingly multiple conspiracies existed. It was highly probable that the jury transferred guilt from one defendant to another based thereon. Camiel, 519 F.Supp. at 1244-45. On appeal, the Third Circuit held that **the defect in the indictment itself was the root cause of the prejudicial variance,** and allowed for and encouraged a full range of evidence offered at trial, resulting in "spill over" and "guilty by association" effects. Accordingly, the proper remedy was not retrial, but acquittal.

Like Camiel, the indictment in this case was the root cause of the prejudicial variance, since it was duplicitous. Shirley Colletti was the only live human being on trial in this case. On some counts, the jurors were able to distinguish Mrs. Colletti from Mr. Conforte; on other counts, they simply were not. It is at the very least highly possible that the blurred distinction in the jury's mind had to do with the charged bankruptcy fraud. That is especially so, given that, in rejecting Mrs. Colletti's sufficiency challenge, the Ninth Circuit looked to what Mrs. Colletti supposedly knew about "the bankruptcy fraud" to supply sufficient proof of her "guilty knowledge" re: the charged wire fraud. Since the charged bankruptcy fraud legally could not be, the proper remedy, as in Camiel, is not retrial, but acquittal.

Of course, the government's rejoinder may be that Camiel is questionable authority in light of Miller, which was decided three to four years later. However, in light of Kotteakos, we do not think it is, and that is why this Honorable Court needs to grant *certiorari* and further clarify the rules of when the appellate court on review can save a poorly drafted indictment and when it simply cannot.

Finally, in opposing this Writ, the government may well point to the fact that the Question Presented for Review is not precisely the same issue as that presented to the court below. However, this case presents the situation where the precise question for review is related to the issue litigated in the lower federal courts, but was not really crystalized until the United States Court of Appeals for the Ninth Circuit adopted its *sua sponte* approach. The Joint Petitioners pointed out the problem with the Ninth Circuit's approach in its Petition for Rehearing to the Ninth Circuit. (See: Exhibits 2 and 3 to this Petition). Additionally, Mrs. Colletti argued Russell, *ante*, extensively in the Ninth Circuit briefs.

If a federal question is created by an unexpected decision of the appellate court, giving the litigant no prior opportunity to anticipate or assert the particular federal question, the petition for rehearing constitutes the first and probably only chance to present the matter to that court. Brinkerhoff-Farris Trust v. Hill, 281 U.S. 673, 677-78 (1930). Accordingly, the federal question is timely raised and will support the exercise of Supreme Court jurisdiction. This is true, even though the Petition for Rehearing is summarily denied without reference to the

federal question. Great Northern Railway Company v. Sunburst Oil & Refining Co., 287 U.S. 358, 366-67 (1932).

Federal claims are adequately presented when the lower appellate court renders an unexpected interpretation of law and the aggrieved party makes some kind of effort such as filing a rehearing petition, to bring the new federal claim to the attention of the lower appellate court. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85-86 n.9 (1980).

DATED this 27 day of March, 2002.

Respectfully submitted,

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Exhibit 1

2001 WL 737632 (Table)
Unpublished Dispostition

(Cite as: 2001 WL 737632 (9th Cir.(Nev.)))

Only the Westlaw citation is currently available.

NOTICE: THIS IS AN UNPUBLISHED OPINION. Use F1 CTa9 Rule 36-3 for rules regarding the citation of unpublished opinions.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

United States Court of Appeals, Ninth Circuit

UNITED STATES of America, Plaintiff-Appellee,

v.

A.G.E. ENTERPRISES, INC., and A.G.E. CORPORTION, INC., Defendants-Appellants
UNITED STATES of America, Plaintiff-Appellee,

v.
Shirley COLLETTI, Defendant-Appellant.

No. 00-10188, 00-10194, 00-10195.
D.C. No. CR-N-95-049-HDM

Argued and Submitted May 16, 2001
Decided June 29, 2001.

Appeal from the United States District Court for the District of Nevada. Howard D. McKibben, District Judge, Presiding

Before NOONAN and SILVERMAN, Circuit Judges, and SEDWICK, District Judge. [FN2]

FN2. The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation

MEMORANDUM [FN1]

FN1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

*1 Appellants A.G.E. Enterprises, Inc. and A.G.E. Corporation, Inc. (collectively "A.G.E.") and Shirley Colletti ("Colletti") appeal their jury convictions for wire fraud, in violation of 18 U.S.C. § 1343, and RICO activities, in violation of 18 U.S.C. § 1962(c) and (d) and 18 U.S.C. § 1963. Appellants contend that there were various errors in the proceedings below.

A. Bankruptcy Fraud Not Necessary for Wire Fraud Convictions.

The superceding indictment is very specific with respect to the wire fraud charged in Counts Eight through Twenty-Eight. Although the counts incorporate by reference the factual allegations of Count Four, which

detail Joseph Conforte's ("Conforte") use of the wires to commit bankruptcy fraud, the counts also allege a separate scheme to defraud the IRS, including specific details as to appellants' involvement in the scheme. For example, the indictment describes how A.G.E. was created solely to hide Conforte's Mustang Ranch income from the IRS. The superceding indictment alleges that the defendants, including Colletti, would, at Conforte's directions, wire money from A.G.E.'s accounts in the United States to foreign accounts for Conforte's ultimate use and benefit, and would cause money to be drawn from A.G.E.'s accounts in amounts payable to Colletti that would ultimately be transferred to Conforte's control. Finally, the indictment identifies twenty-one specific uses of the wires by date, amount and payee. These allegations, if proven, would satisfy the fraud element required for a wire fraud convictions regardless of the disposition of the bankruptcy fraud charged in other counts. *See United States v. Garlick*, 240 F.3d 789, 792 (9th Cir. 2001)(wire fraud has three elements (1) a scheme to defraud, (2) use of the wires in furtherance of the scheme, and (3) a specific intent to deceive or defraud). Accordingly, the disposition of Counts One through Three was inconsequential to the wire fraud charges on which appellants were convicted.

The same is true with respect to the RICO counts. The superceding indictment proposes the twenty-one alleged instances of wire fraud as well as monthly bribery payments to the Storey County Commissioner and Storey County Sheriff as predicate acts which support the RICO charges. The superceding indictment also describes the purpose of the enterprise as "generating, collecting,

receiving, and holding income, whether reported or unreported to the Internal Revenue Service, from the property known as the Mustang Ranch, and by illegally distributing said income to defendant Joseph Conforte." These statements demonstrate that proof of the RICO counts, at least with respect to appellants, did not rest upon proof of the bankruptcy fraud charges in Counts One through Three.

B. Attorney-Client Privilege

Tudor Chirila ("Chirila") an attorney and prior president of A.G.E. was permitted to testify regarding three conversations he had with Colletti in late 1996. The district court found that the crime-fraud exception trumped appellants' attorney-client privilege. Colletti appeals that finding.

*2 The crime-fraud exception applies to attorney-client communications which "solicit or offer advice for the commission of a crime or fraud." *In re Grand Jury Subpoena 92-1(SJ),* 31 F.3d 826, 829 (9th Cir. 1994) (internal quotation omitted). To successfully invoke the exception, the government must make a prima facie showing that the exception applies which requires non-privileged evidence that is "sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability." *United States v. de la Jara,* 973 F.2d 746, 748 (9th Cir. 1992) (internal quotation omitted). The circuit has not yet decided which standard of review applies to a review of the government's prima facie showing. *See United States v. Bauer,* 132 F.3d 504, 509 (9th Cir. 1997)

(electing not to resolve uncertainty); *In re Grand Jury Proceedings,* 87 F.3d 377, 380 (9th Cir. 1996) (electing not to decide between *de novo* and abuse of discretion).

Regardless of the standard of review employed, the government satisfied its prima facie burden through the testimony and evidence presented by David G. Menchetti ("Menchetti"), a legal advisor to A.G.E. A.G.E. retained Menchetti as general counsel for approximately fourteen months between January 1995 and February or March 1996. Menchetti attested to several phone conversations he had with Conforte during that period in which they discussed the option agreement. Menchetti stated that Conforte had told him that the option was a sham transaction that was originally created to "usurp the government's deal" but he, i.e., Conforte, feared Colletti would at some point attempt to record and execute on it. These facts are also set forth in a memorandum dated June 8, 1995, which Menchetti wrote following one of his telephone conversations with Conforte and which was entered into evidence.

Chirila was hired to manage Nevada Rodeway LLC. Colletti and others formed Nevada Rodeway in order to exercise the option agreement. It follows that Menchetti's testimony and memorandum, which demonstrate that Colletti knew that fraud on the IRS would occur should she exercise the option agreement, supports a reasonable belief that *in camera* review of Chirila's testimony would yield evidence that Colletti sought Chirila's advice in order to take actions which she knew would result in a fraud on the IRS. *See United States v. Munoz,* 233 F.3d 1117, 1136 (9th Cir. 2000) (reckless disregard for the

consequences of one's actions satisfies the intent requirement for mail fraud); *United States v. Ely*, 142 F.3d 1113, 1121 (9th Cir. 1997) (same in bank fraud context). Chirila in fact testified that Colletti told him that the option was a sham and was intended to forestall the forfeiture of Mustang Ranch to the IRS. The district court correctly concluded that Colletti sought Chirila's advice in order to commit a fraud. Consequently, the district court did not err and correctly applied the crime-fraud exception.

C. Sufficiency of the Evidence

*3 A conviction is supported by sufficient evidence if the evidence, viewed in the light most favorable to the government, would allow any rational trier of fact to find the essential elements of the charged offense beyond a reasonable doubt. *See United States v. Crawford*, 239 F.3d 1086, 1092 (9th Cir. 2001). Where the charge is wire fraud, "there must be sufficient evidence to show that the defendant willful[ly] participate[d] in a scheme with knowledge of a fraudulent nature and with intent that these illicit objectives be achieved." *United States v. Ciccone*, 219 F.3d 1078, 1084 (9th Cir. 2000) (internal quotation omitted). The requisite knowledge may be established through circumstantial evidence. *See id.*

The wire fraud convictions are supported by sufficient evidence. Peter Perry ("Perry"), Joann Olcese ("Olcese"), and Dorothy Tarbet ("Tarbet") all presented testimony that linked Colletti to money missing from Mustang Ranch and the wire transfers to Conforte. Perry's testimony was the most important. Perry testified about

meetings between him, Conforte, and Colletti at which they discussed ways Storey County Commissioners could help prevent the IRS from taking over and running Mustang Ranch. At the time, Colletti was a Storey County Commissioner and was receiving $2,500 a month from Conforte. Perry also testified about Colletti's involvement in the wire transfers from A.G.E. to Mygrange, Ltd., which was an "off-the-shelf" company Perry set up to hide Conforte's involvement with Mustang Ranch. Perry identified receipts from six transfers which had been remitted by Colletti. Finally, Perry testified about $750,000 of Mustang Ranch money that was unaccounted for Perry learned from Conforte that Conforte was receiving quarterly payments from either John Colletti, Colletti's husband at the time, or Henry Bland, a Storey County Commissioner. This was the money that was regularly missing from Mustang Ranch's records. Perry's testimony was corroborated by Olcese, a bookkeeper at Mustang Ranch, who provided further testimony about the wire transfers and other deliveries of money to Conforte and by Tarbet, a cashier at Mustang Ranch, who witnessed Colletti taking money from a Mustang Ranch safe.

D. Sentencing Issues

A district court's factual findings during the sentencing phase are reviewed for clear error. *See United States v. Mesas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000). The district court's application of the guidelines to the facts of a particular case is reviewed for abuse of discretion. *See United States v. Frega*, 179 F.3d 793, 811 n. 22 (9th Cir. 1999), *cert. denied*, 528 U.S. 1191, 120 S.Ct. 1247, 146

L.Ed. 2d 105 (2000).

The district court found that Colletti had substantial involvement in Conforte's plan to defraud the IRS and was, along with Perry, a principal contact for Conforte in the United States. Accordingly, the district court denied Colletti's request for a two-level reduction pursuant to § 3B1.2 of the sentencing guidelines and, instead, gave a two-level specific offense increase pursuant to § 2F1.1(b)(2) and a two-level role adjustment increase pursuant to § 3B1.1. Based on the evidence discussed above, no clear error exists with respect to the district court's factual findings.

*4 In light of Colletti's knowledge, no abuse of discretion occurred in choosing not to apply the downward adjustment. *See* Sentencing Guidelines, Commentary § 3B1.2(2000) (a two-level decrease pursuant to § 3B1.2(b) is warranted for defendants found to be "less culpable than most other participants, but whose role could not be described as minimal" under § 3B1.2(a)).

The increases to Colletti's total offense level were also warranted. Considering that the acts of wire fraud for which Colletti was convicted occurred over a period of 14 months and when requested by Conforte, as opposed to at "purely opportune" times, the district court did not abuse its discretion in applying the 2F1.1(b)(2) two-level increase for more than minimal planning. *See* United States Sentencing Guidelines, Commentary, Application Note (f) 1B1.1 ("More than minimal planning" exists where the defendant takes "significant affirmative steps . . . to conceal the offense" or repeat[s the illegal] acts over

a period of time, unless it is clear that each instance was purely opportune.") Lastly, the two-level enhancement pursuant to § 3B1.1 was warranted because Colletti directed the actions of Olcese, who was a "participant" in the scheme, and had some degree of managerial control over the property and assets involved, i.e., Mustang Ranch and its revenues. *See* Sentencing Guidelines, Commentary Application Note (2) 3B1.1 (a defendant qualifies for an adjustment under 3B1.1 where she is "the organizer, leader, manager or supervisor of one or more other participants" or where the defendant "exercised management responsibility over the property, assets, or activities of a criminal organization.")

E. Juror Bias or Misconduct

Following appellants' conviction, the district court denied motions for a new trial or for judgments of acquittal that were premised on alleged incidents of juror bias and misconduct. The district court's decision is reviewed for abuse of discretion. *See United States v. Hanley*, 190 F.3d 1017, 1031 (9th Cir. 1999)

An evidentiary hearing is not required every time a defendant alleges juror misconduct or bias. *See id.* The district court is to determine whether a hearing is warranted based on "the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." *Id.* (quoting *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993) In this case, the district court did what it was required to do. After receiving briefing from counsel regarding the alleged misconduct, the court elected to conduct an evidentiary

hearing. No more was required.

Appellants contend that the district court failed to adequately question two of the jurors, Cynthia P. and Laura B., during the evidentiary hearing regarding alleged misstatements during *voir dire*. In particular, appellants focus on answers Cynthia P. gave regarding her education, past bankruptcy experiences or her spouse's employment, and answers Laura B. gave regarding her education, disabilities and bias.

*5 A new trial is warranted only when an appellant can demonstrate that (1) a juror failed to answer a material *voir dire* question and (2) a correct response would have provided a valid basis for a challenge for cause. *See United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) (citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed. 2d 663 (1983)). No error occurred in this case because none of the disputed answers, save those related to Laura B's disability or bias, could have provided a valid basis for a challenge for cause.

With respect to Laura B.'s disability, the district court did not commit clear error in finding that Laura B. did not lie. *See Hanley*, 190 F.3d at 1031 (a district court's credibility determinations and findings of historical fact are reviewed for clear error). The questions at *voir dire* (and on the jury card filled out prior to *voir dire*) focused on disabilities that would impair a juror's ability to sit on a jury. Laura B.'s answers were truthful. Despite the fact that Laura B. suffers from a seizure disorder and takes medication, her condition, as she testified at the

evidentiary hearing, was under control.

Where a colorable claim of juror bias is presented, the court is required to investigate the relevant facts and circumstances. *See Dyer v. Calderon*, 151 F.3d 970, 974 (9th Cir. 1998), *cert. denied,* 525 U.S. 1033, 119 S.Ct. 575, 142 L.Ed. 2d 479 (1999). When an evidentiary hearing is held, due process requires only that the investigation be "reasonably calculated to resolve the doubts raised about the juror's impartiality." *Id.* at 974-975.

During *voir dire*, the district court queried jurors regarding their knowledge of Conforte and potential bias. Laura B. informed the court that she had seen an article about the case and Mustang Ranch in the prior day's paper, but did not read past the headline. Laura B. also confirmed that she knew of Mustang Ranch and had heard of Conforte. Appellants did not ask Laura B. follow-up questions about her knowledge. Consequently, the only anser that potentially could have been untruthful was Laura B.'s answer regarding bias.

At the evidentiary hearing, the district court questioned Laura B. regarding her response to the bias question. She reiterated that she did not have any bias prior to the trial and believed she could be fair and impartial. This comports with her response during *voir dire* that she could "put the government to its burden" before convicting the defendants. The court's questioning was reasonably calculated to investigate the alleged bias and, in light of the answer received, there is no clear error in the district court's finding that Laura B. truthfully

answered the bias question. *See Image Tech Serv., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1220-21 (9th Cir. 1997) (district court's conclusion regarding a juror's candor is entitled to deference).

*6 Lastly, there is no merit to appellant's argument that Laura B. introduced extraneous information into the jury's deliberations. No juror other than Laura B. recalled anyone mentioning extraneous information about Conforte or Ross Brymer, Sr. Accordingly, no clear error exists with respect to the district court's findings on this issue.

F. Ex Parte Communication

The trial judge briefly visited with juror Laura B. upon learning that she had been stuck in a courthouse elevator and had become upset. The judge briefly referenced the incident in open court. Although appellants were present and had the opportunity to observe the jurors for any ill-effects, they made no further inquiry. At the evidentiary hearing, the district court more fully explained the *ex parte* conversation. At that time, A.G.E. informed the court that it "had no problem with that."

The district court was under no general duty to inform the parties. *See Rushen v. Spain*, 464 U.S. 114, 119, 104 S.Ct. 453, 456, 78 L.Ed 2d 267 (1983) (court should generally relate an *ex parte* communication with counsel when it relates to some aspect of the trial). Nevertheless, the disclosures that were made demonstrate that no harm occurred as a result of the *ex parte* communication. *See United States v. Velasquez-Carbona*, 991 F.2d 574, 576

(9th Cir. 1993) (no prejudice presumed where court is courteous to a juror and asks law clerk to give juror ride to bus stop). It follows that the district court did not err. *See Rushen*, 464 U.S. at 119, 104 S.Ct. at 456 (*ex parte* contact reviewed for harmless error).

G. Brady Violations

Challenges to convictions based on alleged *Brady* violations are reviewed *de novo*. *See United States v. Amlani*, 111 F.3d 705, 712 (9th Cir. 1997). Appellants contend that the government failed to produce evidence that it promised Perry that his interests in certain development property would not be subjected to a forfeiture action. To prevail on their *Brady* claim, appellants must show that (1) the evidence not provided was exculpatory or impeaching; (2) it should have been but was not produced, and (3) the suppressed evidence was material to their guilt or punishment. *See United States v. Cooper*, 173 F.3d 1192, 1202 (9th Cir.), *cert. denied*, 528 U.S. 1019, 120 S.Ct. 526, 145 L.Ed 2d 408 (1999) (citation omitted).

Appellants cannot establish either the second or third elements. First, there is no proof that the government had an agreement with Perry respecting the development property. Second, appellants cannot show that the allegedly suppressed information was material. During cross-examination, appellants catalogued with Perry the many benefits that he would receive in exchange for his testimony; not having to face the bankruptcy charge, not having to face the additional wire fraud or RICO charges alleged in the superceding indictment, a possibility of

avoiding jail time, and a possibility of avoiding significant fines and costs. In so doing, appellants accomplished what they seek to achieve through the evidence they claim should have been disclosed, proof that Perry stood to gain a great deal by testifying for the government. Consequently, the evidence sought is not material to their defense. *See id.* ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

H. Jury Questionnaire

*7 Appellants contend that the district court erred by denying their request to use a jury questionnaire. Appellants' argument is without merit. Prior to trial, the district court asked counsel to provide proposed jury questions and, during *voir dire*, allowed counsel to ask follow-up questions. Appellants in fact questioned potential jurors about their knowledge of Conforte and their views on prostitution. Rule 24(a) which permits district courts to allow parties or their attorneys to examine potential jurors or to conduct the examination itself based on questions submitted by the parties and their attorneys does not require any more than this. Therefore, the district court did not abuse its discretion in rejecting the use of a jury questionnaire. *See United States v. Howell*, 231 F. 3d 615, 628 (9th Cir. 2000) (decision regarding supplemental questions within "the sound discretion" of the district court).

AFFIRMED. END OF DOCUMENT.

Exhibit 2

00-10188 00-10194

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff and Appellee

vs

A.G.E. ENTERPRISES, INC.
and
A.G.E. CORPORATION, INC.
Defendants and Appellants

Appeal from the United States District Court
For the District of Nevada
Hon. Howard D. McKibben, District Judge
CR-N-95-049-HDM

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

RICHARD SHERMAN (SBN 3 [1]1 098)
11835 W. Olympic Blvd., Ste.705E
Los Angeles, CA. 90064
(310) 477-1595
Attorney for Defendants and Appellants'
A.G.E. Enterprises, Inc. and A.G.E. Corporation, Inc.

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concealment by Juror Laura B clearly perpetrated in an effort to preserve her status as a juror and to secure her right to pass on the Appellants' sentence. Similarly to the case of the Juror in *Dyer,* the false statements made by Juror Laura B give rise to implied bias based on the circumstances. The Panel was wrong in ignoring the implied bias evident in this case.

II. IF THE TRIAL COURT HAD GRANTED APPELLANTS' MOTION TO DISMISS COUNTS 1-3 OF THE SUPERSEDING INDICTMENT THE REMAINING COUNTS IN THE INDICTMENT WOULD NOT SURVIVE

The Petitioners contended on appeal that the convictions for Bankruptcy Fraud contained in Counts 1-3 of the indictment were invalid and the evidence related thereto which was presented before the jury prejudiced Petitioner as to the remaining counts of the Indictment. The Panel in its decision treated Counts 4-33 of the indictment as though they were somehow separable from Counts 1-3 when, in fact, Counts l.-3 and the evidence introduced with regard thereto are inextricably interwoven with each of the remaining counts in the indictment. It was the appellants' contention that the trial Court should have dismissed counts 1-3 pursuant to the defendants' motions therefor. That issue was not referred to in the Panel's unpublished opinion. That decision seemed to assume the....

bankruptcy counts should have been dismissed but that there was no prejudice to the rest of the Counts in the Indictment.

A reading of Counts 4-28 (ER 4: lines 19-20; ER 5; ER6:lines 25-26; ER7:lines 20-21; ER 8:lines 10, 17-18; ER 9: lines 6, 15-16) reveals that each them incorporates and relies upon the allegations of Counts 1-3 or a substantial part thereof (ER 3: lines 7-10, 17-24). The Government's presentation at trial of Counts 4-33 were, in great part, based on the allegations of and evidence related to

Counts 1-3. That being the case how can it be said that the allegations and evidence related to Counts 1-3 did not have a prejudicial effect on Counts 4-29? A fair reading of the indictment reveals that it could not be so.

The Panel found that because the RICO counts, Counts 29-33 could have rested on wire fraud as well as bribery payments to support the predicate acts contained in the indictment a dismissal of the bankruptcy fraud counts had no effect thereon (Memorandum at 3). First, as set forth above, each Count in the Indictment, Counts 1-28 were based upon specific allegations and evidence of bankruptcy fraud. Second, Count 29, witness tampering, only involved Joseph Conforte who was not a defendant in the instant case and there was no verdict returned as to him. Third, each of the R.I.C.O. counts, 30-33 was based upon the bankruptcy fraud, wire fraud and money laundering charges in the indictment each

of which has been fatally infected with the bankruptcy charges and evidence in this case.

If the bankruptcy charges were dismissed as requested in the trial Court the government would have had to file a superceding indictment, if it were able to do so, and present a new indictment on different charges. The Panel avoided the issue, briefed by both parties, as to whether the Bankruptcy charges should have been dismissed, and instead assumed they had been dismissed and made a fatally flawed analysis on the effect that would have proceeded therefrom in the trial Court to support its opinion.

Dated August 10, 2001

Respectfully Submitted

Richard G. Sherman Attorney for Appellants'
A.G.E. Enterprises, Inc. and A.G.E. Corporation, Inc.

Exhibit 3

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 00-10195
DC NO. CR-95-0049-HDMNevada (Reno)

v.

SHIRLEY COLLETTI,
Defendant-Appellant,

APPEAL AFTER JURY VERDICT AND SENTENCE

The Honorable Howard D. McKibben, presiding

PETITION FOR REHEARING AND SUGGESTIONFOR REHEARING *EN BANC*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 00-10195 DC NO. CR-95-0049 -HDM Nevada (Reno)
v.	
SHIRLEY COLLETTI, Defendant-Appellant,	**PETITION FOR REHEARING AND SUGGESTIONFOR REHEARING *EN BANC*,**

COMES NOW, Petitioner, SHIRLEY COLLETTI, by and through the undersigned counsel of record, and petitions the panel (JJ Noonan and Silverman and D. J. Sedwick) for a Rehearing with respect to the Memorandum Disposition filed on June 29, 2001.

This Petition is timely filed, per the Order of July,_____2001.

This Petition pertains to the following issues:

1. THE TRIAL COURT COMMITTED CLEAR ERROR AND ABUSED ITS DISCRETION IN UPWARDLY ENHANCING MRS. COLLETTI'S SENTÉNCE ON THE GROUNDS OF "MORE THAN MINIMAL PLANNING."

2. THE TRIAL COURT COMMITTED CLEAR ERROR AND ABUSED ITS DISCRETION IN UPWARDLY ENHANCING MRS. COLLETTI'S SENTENCE ON THE GROUNDS OF "ORGANIZER/MANAGER/SUPERVISOR" AND REFUSING TO ADJUST DOWNWARDLY ON THE BASIS OF "MINOR PARTICIPANT."

3. THE TRIAL COURT COMMITTED REVER-SIBLE ERROR IN ADMITTING EVIDENCE OF COMMUNICATION BETWEEN APPELLANT AND A.G.E. 'S/HER COUNSEL.

Petitioner contends that the panel overlooked material evidence and principles of law, critical to the resolution of those issues. Further, Petitioner contends that Issue No. 1 is governed by United States v. Archuletta, 231 F.3d 682, 684-86

(10"'' Cir. 2000) ; Issue No. 2 is governed by United States v. Del Toro-Acuilera, 138 F. 3d 340, 343 (8"" Cir. 1999) ; and Issue No. 3 is governed by in Re: Grand Jury Subpoena 92-1 (SJ), 31 F.3d 826, 831 (9" Cir. 1994) . Therefore, a Rehearing *en Banc is* uggested, in order to ensure uniformity of the circuits anc,or this Circuit in application of the U.S. Sentencing Guidelines and application of the crime-fraud exception to the attorney-client privilege.

If the A.G.E. Appellants file a Petition fcr Rehearing and/or Suggestion for Rehearing *en Banc* in Cases Nos. 00-10188 and 00-10194, then Petitioner Colletti joins in these issues, inasmuch as they pertain to her as well as to A.G.E.

DATED this 10TH day of July , 2001.

Respectfully submitted,
LAW OFFICE OF RICHARD F. CORNELL
150 Ridge Street, Second Floor
Reno, Nevada 89501
BY: Richard F. Cornell

I. THE TRIAL COURT COMMITTED CLEAR ERROR AND ABUSED ITS DISCRETION IN UPWARDLY ENHANCING MRS. COLLETTI'S SENTENCE ON THE GROUNDS OF "MORE THAN MINIMAL PLANNING"

The panel upheld the increase to Mrs. Colletti's base offense level under § 2F1.1(b)(2), or "more than minimal planning," because she sent numerous payments to Mygrange over a period of 14 months when requested to do so by Conforte.

Unquestionably, Mrs. Colletti strictly did what she was told to do by Conforte, the ostensible agent for the owners of A.G.E., and/or by Perry, the then minority owner. She did nothingdeceptive in the wiring of these monies to Mygrange. She did not

Exhibit 4

FILED
OCT 10, 2001
CATHY KATTERSON
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 00-10188
D.C. No. CR-N-95-049-HDM

AGE ENTERPRISES,
Defendant-Appellant,

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 00-10194
D.C. No. CR-N-95-049-HDM

AGE ENTERPRISES,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff Appelle,

No. 00-10195
D.C. No. CR-N-95-049-HDM

v.

AMENDED ORDER

SHIRLEY COLLETTI,
Defendant-Appellant,

Before: NOONAN and SILVERMAN, Circuit Judges, and SEDWICK, DISTRICT JUDGE

The panel has voted to deny the petitions for rehearing. Judge Silverman has voted to deny the petitions for rehearing en banc and Judges Noonan and Sedwick so recommend.

The full court has been advised of the petition and suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and petition/suggestion for rehearing en banc are denied

Exhibit 5

KATHRYN E. LANDRETH
United States Attorney
MICHAEL E. BARR
Assistant United States Attorney
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Telephone: (702) 388-6363

FILED
NOV 01 1995
Clerk U.S. District Court
District of Nevada

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff,	CRIMINAL INDICTMENT CR
v.	VIOLATIONS: 18 U.S.C. 5 152 Bankruptcy Fraud; 18 U.S.C. § 1343 Wire Fraud; 18U.S.C. § 2 (Aiding & Abetting)
jOSEPH CONFORTE, and PETER A. PERKY Defendants.	CR-N-95-00049-HDM (N/A)

THE GRAND JURY CHARGES THAT:

COUNT ONE

(Bankruptcy Fraud; Aiding & Abetting)

At all times relevant to this indictment:

1. Defendant JOSEPH CONFORTE and Sally Conforte own and operated a legal brothel known as the Mustang Ranch, locat in Mustang, Nevada.

2. Defendant PETER A. PERRY was an attorney licensed to practice law in the state of Nevada and represented defendant JOSEPH CONFORTE.

CERTIFIED T IFIED TO BE A TRUE COPY
United States Distract Ce::rt
By_____
Deputy Clerk

3. On September 10, 1982, JOSEPH CONFORTE opened an account at the Discount Bank and Trust Company in Geneva, Switzerland (Discount Bank), numbered 76206 in the name of Jose C. Montoya. Defendant JOSEPH CONFORTE solely controlled this account and made and caused to be made numerous deposits and withdrawals from this account.

4. On November 24, 1982 defendant JOSEPH CONFORTE quitclaimed his interest in certain real property known as the Mustang Ranch to his wife Sally Conforte.

5. On November 26, 1982, Sally Conforte filed a Chapter Eleven bankruptcy petition, case numbered 82-966 (Sally Conforte Bankruptcy) in the United States Bankruptcy Court for the District of Nevada (Bankruptcy Court). The Internal Revenue Service was the major creditor.

6. On January 24, 1985, Sally Conforte quitclaimed back to herself and to defendant JOSEPH CONFORTE certain real property known as the Mustang Ranch, subject to the Order Confirming Plan in the Sally Conforte Bankruptcy, said Order dated February 15, 1984.

7. On September 18, 1990, the Sally Conforte Bankruptcy was converted into a liquidation proceeding under Chapter Seven. A bankruptcy trustee was appointed to liquidate the assets to pay the debtor's creditors.

8. On September 18, 1990, defendant JOSEPH CONFORTE filed a Chapter Eleven bankruptcy petition, case numbered 90-1331 (Joseph Conforte Bankruptcy) in the United States Bankruptcy Court for the District of Nevada. The Internal Revenue Service was the major creditor. Defendant PETER A. PERRY initially represented defendant

JOSEPH CONFORTE in the filing of said petition.

9. On February 5, 1991, the Joseph Conforte Bankruptcy wasdismissed.

10. On May 6, 1992, the Sally Conforte Bankruptcy was dismissed.

11. On or about December 19, 1989 and continuing until on or about May 6, 1992, within the District of Nevada, defendants JOSEPH CONFORTE and PETER A. PERRY, with the intent to defeat the provisions of Title 11 of the United States Code (Bankruptcy Code), did knowingly and fraudulently transfer and conceal the property of Joseph Conforte, to wit; a parcel of land located in Washoe County, Nevada, held in the name of Ruth Hurd, parcel number 26-013-01.

All in violation of Title 18, United States Code, Section 152 and Section 2.

COUNT TWO

(Bankruptcy Fraud; Aiding & Abetting)

1. The grand jury realleges and incorporates Paragraphs 1 through 10 of Count One, as though fully set forth herein.

2. From on or about September 28, 1990 and continuing until on or about May 6, 1992, within the District of Nevada, defendant JOSEPH CONFORTE, with the intent to defeat the provisions of Title 11 of the United States Code (Bankruptcy Code), did knowingly and fraudulently transfer and conceal his property, to wit; money deposited in a bank account, account number 3356809859 at the Primerit Bank in Sparks, Nevada.

All in violation of Title 18, United States Code, Section 152 and Section 2.

COUNT THREE

(Bankruptcy Fraud; Aiding & Abetting)

A. INTRODUCTION

1. The grand jury realleges and incorporates Paragraphs 1 through 10 of Count One, as though fully set forth herein.

B. PURPOSE OF THE SCHEME AND ARTIFICE

2. From on or about September 10, 1982 and continuing until on or about May 6, 1992, within the District of Nevada, defendants JOSEPH CONFORTE with the intent to defeat the provisions of of Title 11 of the United States Code (Bankruptcy Code), did knowingly and fraudulently transfer and conceal property belonging to JOSEPH CONFORTE and Sally Conforte, to wit; money deposited into a bank at the Discount Bank and Trust Company, Geneva, Switzerland, account number 76206, opened in the name of Jose C. Montoya.

All in violation of Title 18, United States Code, Section 152 and Section 2.

COUNT FOUR

(Wire Fraud; Aiding & Abetting)

A. INTRODUCTION

The grand jury realleges and incorporates Paragraphs 1 10 of Count One, as though fully set forth herein.

B. PURPOSE OF THE SCHEME AND ARTIFICE

From on or about September 18, 1990, and continuing to on about May 6, 1992, defendants JOSEPH CONFORTE and PETER A. PERRY, devised and intended to devise a scheme and artifice to defraud the internal Revenue Service of and concerning property known as the Mustang Ranch.

C. THE SCHEME AND ARTIFICE

1. It was part of the scheme and artifice that the defendants would file and did file a Chapter Eleven bankruptcy petition, case numbered BR-N-90-1331-JHT (Joseph Conforte Bankruptcy) in the United States Bankruptcy Court for the District of Nevada (Bankruptcy Court).

2. It was a part of the scheme and artifice that the defendants knowingly and intentionally failed to file a statement of assets in said petition.

3. It was a part of the scheme and artifice that the defendants filed pleadings in the Joseph Conforte bankruptcy and in the Sally Conforte bankruptcy claiming that JOSEPH CONFORTE had no interest in Mustang Properties, Incorporated, the prospective purchaser of the property known as the Mustang Ranch.

4. It was part of the scheme and artifice that the account at Discount Bank was concealed from the trustee and creditors of the Sally Conforte bankruptcy.

5. It was part of the scheme and artifice that on or about August 14, 1990, the defendants caused to be transferred approximately $800,000.00 from the Discount Bank and Trust Company in Geneva, Switzerland to PETER PERRY c/o Mustang Properties, Inc. at the Valley Bank of Nevada, Reno, Nevada, account number 323179160.

6. It was part of the scheme and artifice that on or about November 30, 1990, the defendants caused to be transferred approximately $1,000,000.00 from the Discount Bank and Trust Company in Geneva, Switzerland to PETER PERRY c/o mustang Properties, Inc. at the Valley Bank of Nevada, Reno, Nevada, account number 323179160.

7. It was part of the scheme and artifice that on or about November 13, 1990, defendant PETER A.PERRY purchased the property known as the Mustang Ranch on behalf of Mustang Properties, Incorporated, using the funds transferred from the account at Discount Bank and Trust Company in Geneva, Switzerland.

D. THE WIRE COMMUNICATION

On or about August 14, 1990 and on or about November 30, 1990, in the District of Nevada, defendants JOSEPH CONFORTE and PETER A. PERRY, for the purpose of executing and attempting to execute a scheme and artifice to defraud, and for obtaining property by means of false and fraudulent pretenses, representations

and promises, did transmit and cause to be transmitted in interstate and foreign commerce, by means of wire, radio or television communication, certain-signs, signals, pictures or sounds for the purpose of executing such scheme and artifice, to wit; the transfer of funds, from the Discount Bank, account number 76206 to the Valley Bank of Nevada, account number

All in violation of Title 18, United States Code, Section 1343 and Section 2.

A TRUE BILL:

DATED this 1 day of NOVEMBER, 1995.

_____

Foreperson

KATHRYN E. LANDRETH
United States Attorney

MICHAEL E. BARR
Assistant United States Attorney

Exhibit 6

KATHRYN E. LANDRETH
United States Attorney
KURT P. SCHULKE
Attorney in Charge
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Organized Crime Strike Force
701 East Bridgar Street, Suite 550
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Attorneys for the Government

U.S. DISTRICT COURT
DISTRICT OF NEVADA
FILED
AUG 5 1998
Clerk U.S. District Court
BY DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOSEPH CONFORTE, A.G.E., ENTERPRISES, INC., A.G.E., CORPORATION, INC., SHIRLEY COLLETTI, JOANN OLCESE, EDUARDO NEVES,
Defendants.

Superseding Criminal Indictment

CR-N-95-0049-HDM

Violations: 18 U.S.C. 152 (Bankruptcy Fraud); 18 U.S.C. 1343 (Wire Fraud); 18 U.S.C. 2(Aiding & Abetting); 18 U.S.C. 1956 (Money Laudering); 18 U.S.C. 1512 (Witness Tampering); 18 U.S.C. 1962 (C) (Racketeering); 18 U.S.C. 1962 (d) (Conspiracy); 18 U.S.C. 982 and 1963 (Forfeiture)

Counts 8-28: 30 racketeering / 31 (33-Rico Forfeture)

THE GRAND JURY CHARGES THAT:

At all time relevant to this indictment:

1. Defendant JOSEPH CONFORTE and Sally Conforte owned and operated a legal brothel known as the Mustang Ranch, located in Mustang, Nevada.

2. Peter Perry was an attorney licensed to practice law in the State of Nevada and represented defendant JOSEPH CONFORTE.

3. On September 10, 1982, JOSEPH CONFORTE opened an account at the Discount Bank and Trust Company in Geneva, Switzerland (Discount Bank), numbered 76206 in the name of Jose C. Montoya. Defendant JOSEPH CONFORTE solely controlled this account and made and caused to be made numerous deposits and withdrawals from this account.

4. On November 24, 1982, defendant JOSEPH CONFORTE quitclaimed his interest in certain real property known as the Mustang Ranch to his wife Sally Conforte.

5. On November 26, 1982, Sally Conforte filed a Chapter Eleven bankruptcy petition, case numbered 82-966 (Sally Conforte Bankruptcy) in the United States Bankruptcy Court for the District of Nevada (Bankruptcy Court). The Internal Revenue service was the major creditor.

6. On January 24, 1985, Sally Conforte quitclaimed back to herself and to defendant JOSEPH CONFORTE certain real property known as the Mustang Ranch, subject to the order Confirming Plan in the Sally Conforte Bankruptcy, said Order dated February 15, 1984.

7. On September 18, 1990, the Sally Conforte Bankruptcy was converted into a liquidation proceeding under Chapter Seven. A bankruptcy trustee was appointed to liquidate the assets to pay the debtor's creditors.

8. On September 18, 1990, defendant JOSEPH CONFORTE filed a Chapter Eleven bankruptcy petition, case numbered 90-1331 (Joseph Conforte Bankruptcy in the United States Bankruptcy Court for the District of Nevada. The Internal Revenue Service was the major creditor. Peter A. Perry initially represented defendant JOSEPH CONFORTE in the filing of said petition.

9. On February 5, 1991, the Joseph Conforte Bankruptcy was dismissed.

10. On May 6, 1992, the Sally Conforte Bankruptcy was dismissed.

11. From on or about December 19, 1989 and continuing until an or about May 6, 1992, within the District of Nevada, defendants JOSEPH CONFORTE and Peter A. Perry, with the intent to defeat the provisions of Title 11 of the United States Code (Bankruptcy Code), did knowingly and fraudulently transfer and conceal the property of defendant JOSEPH CONFORTE *to wit;* a parcel *of land located in* Washoe County, Nevada, held in the name of Ruth Hurd, parcel number 26-013-01.

All in violation of Title *18, United* States Code, Section 152 and Section 2.

COUNT TWO

(Bankruptcy Fraud; Aiding & Abetting)

1. The grand jury realleges and incorporates Paragraphs 1 through 10 of Count One, as though fully set forth herein.

2. From on or about September 28, 1990 *and continuing until at least May 6, 1992, within the District* of Nevada, defendant JOSEPH CONFORTE, with the intent to defeat the provisions *of Title* 11 of the United States Code (Bankruptcy Code), did knowingly and fraudulently transfer and conceal his property, to wit; money deposited in a bank account, account number 3356809859 at the Primerit Bank in Sparks, Nevada, opened in the name of Neva TateStarrett.

All in violation of Title 18, United States Code, Section 152 3 and Section 2.

COUNT THREE

(Bankruptcy Fraud; Aiding & Abetting)

1. The grand jury realleges and incorporates Paragraphs 1 through 10 of Count One, as though fully set forth herein.

2. From on or about September 10, 1982 and continuing until at least May 6, 1992, within the District of Nevada, defendant JOSEPH CONFORTE with the intent to defeat the provisions of Title 11 of the United States Code (Bankruptcy Code), did knowingly and fraudulently transfer and conceal property belonging to JOSEPH

CONFORTE and Sally Conforte, to wit; money deposited into a bank account at the Discount Bank and Trust Company, Geneva, Switzerland, account number 76206, opened in the name of Jose C. Montoya.

All in violation of Title 18, United States Code, Section 152(7) and Section 2.

COUNT FOUR

(Wire Fraud; Aiding & Abetting)

A. INTRODUCTION

The grand jury realleges and incorporates Paragraphs 1 through 10 of Count One, as though fully set forth herein.

B. PURPOSE OF THE SCHEME AND ARTIFICE

From on or about September 18, 1990, and continuing to at least May 6, 1992, defendant JOSEPH CONFORTE and Peter A. Perry, devised and intended to devise a scheme and artifice to defraud the Internal Revenue Service of and concerning property known as the Mustang Ranch.

C. THE SCHEME AND ARTIFICE

1. It was part of the scheme and artifice that the defendant would file and did file a Chapter Eleven bankruptcy petition, case numbered BK-N-90-1331-JHT (Joseph Conforte Bankruptcy) in the United States Bankruptcy Court for the District of Nevada (Bankruptcy Court).

2. It was a part of the scheme and artifice that the defendant knowingly and intentionally failed to file a statement of assets in said petition.

3. It was a part of the scheme and artifice that the defendant filed pleadings in the Joseph Conforte bankruptcy and in the Sally Conforte bankruptcy claiming that JOSEPH CONFORTE had no interest in Mustang Properties, Incorporated, the prospective purchaser of the property known as the Mustang Ranch.

4. It was part of the scheme and artifice that the account at Discount Bank was concealed from the trustee and creditors of the Sally Conforte bankruptcy.

5. It was part of the scheme and artifice that on or about August 14, 1990, the defendant caused to be transferred approximately $800,000.00 from the Discount Bank and Trust Company in Geneva, Switzerland to Peter Perry c/o Mustang Properties, Inc. at the Valley Bank of Nevada, Reno, Nevada, account number 323179160

6. It was part of the scheme and artifice that on or about November 30, 1990, the defendant caused to be transferred approximately $1,000,000.00 from the Discount Bank and Trust 5 Company in Geneva, Switzerland to Peter Perry c/o Mustang Properties, Inc. at the Valley Bank of Nevada, Reno, Nevada, account number 323179160.

7. It was part of the scheme and artifice that on or about November 13, 1990, Peter Perry purchased the property known as the Mustang Ranch on behalf of Mustang Properties, Incorporated, using funds transferred from the account at Discount Bank and Trust Company in Geneva, Switzerland.

D. THE WIRE COMMUNICATION

On or about August 14, 1990 and on or about November 30, 1990, in the District of Nevada, defendant JOSEPH CONFORTE and Peter A. Perry, for the purpose of executing and attempting to execute a scheme and artifice to defraud, and for obtaining property by means of false and fraudulent pretenses, representations and promises, did transmit and cause to be transmitted in interstate and foreign commerce, by means of wire, radio or television communication, certain signs, signals, pictures or sounds for the purpose of executing such scheme and artifice, to wit; the transfer of funds from the Discount Bank, account number 76206 to the Valley Bank of Nevada, account number 323179160.

All in violation of Title 18, United states code, section 1343 and Section 2.

COUNT FIVE

(Wire Fraud; Aiding & Abetting)

1. The grand jury realleges and incorporates sections A, B, and C of Count Four of this indictment as though fully set forth 6 herein.

D. THE WIRE COMMUNICATION

On or about November 30, 1990, through December 3, 1990, in the District of Nevada, defendant JOSEPH CONFORTE and Peter A. Perry, for the purpose of executing and attempting to execute a scheme and artifice to defraud, and for obtaining property by means of false and fraudulent pretenses, representations and promises, did transmit and cause to be transmitted *in* interstate and foreign commerce, by means of wire, radio or television communication, certain signs, signals, pictures or sounds for the purpose of executing such scheme and artifice, to wit; the transfer of funds from the Discount Bank, account number 76206 through the Union de Banques Suisses, in Geneva, Switzerland, and to Valley Bank of Nevada, account number 323179160.

All in violation of Title 18, United States Code, Section 1343 and Section 2.

COUNT Six

(Money Laundering)

1. The grand jury realleges and incorporates Counts One through Four of this indictment as though fully set forth herein.

2. As of August 14, 1990, approximately $800,000 (U.S.) on deposit at the Discount Bank in Geneva, Switzerland, account number 76206, in the name of Jose C. Montoya, constituted proceeds of some form of unlawful activity.

3. On or about August 14, 1990, in the District of Nevada and elsewhere, JOSEPH CONFORTE, defendant herein, and others acting at his direction and under his control, did knowingly transfer i$800,000.00 (U. S.), from a place outside the United Status, that is from the Discount Bank in Geneva, Switzerland, account number

76206, to a place in the United States, that is to the valley Bank of Nevada, Reno, Nevada, United States of America, knowing that the funds involved in the transportation represented the proceeds of some form of unlawful activity and knowing that such transportation was designed in whole or in part to conceal and disguise the source, ownership and control of the proceeds of specified unlawful activity, to wit: Bankruptcy Fraud, (18 U.S.C. § 152).

4. This offense occurred within the extraterritorial jurisdiction of the United States, 18 U.S.C. Section 1956(f). All in violation of Title 18, United States Code, Section 1956 (a) (Z) (B) (I) and 2.

COUNT SEVEN
(Money Laundering)

1. The grand jury realleges and incorporates Counts One through Four of this indictment as though fully set forth herein. 2. As of December 3, 1990, approximately $1,000,000 (U.S.) on deposit at the Union de Banques Suisses, in Geneva, Switzerland, constituted proceeds of some form of unlawful activity.

3. On or about, December 3, 1990, in the District of Nevada and elsewhere, JOSEPH CONFORTE, defendant herein, and others acting at his direction and under his control, did knowingly transfer funds, from a place outside the United States, that is from the Union de Banques Suisses, in Geneva, Switzerland, to a place in the United States, that is to the Valley Bank of Nevada, Reno, Nevada, knowing that the funds involved in the transportation represented the proceeds of some form of unlawful activity and knowing that such transportation was designed in whole or in part to conceal and disguise the source, ownerehip and control of the proceeds of specified unlawful activity, to wit: Bankruptcy Fraud, (18 U.S.C. 152).

4. This offense occurred within the extraterritorial jurisdiction of the United States, 18 U.S.C. Section 1956(f). All in violation of Title 18, United States Code, Section 1956 (a) (a) (B) (I) and 2.

COUNTS EIGHT THROUGH TWENTY-EIGHT

(Wire Fraud; Aiding & Abetting)

A. INTRODUCTION

The grand jury realleges and incorporates sections A, B and C of Count Four, as though fully set forth herein.

B. PURPOSE OF THE SCHEME AND ARTIFI CE

From on or about September 18, 1990, and continuing to at least May 6, 1992, defendants JOSEPH CONFORTE, SHIRLEY COLLETTI, JOANN OLCESE, EDUARDO NEVES, A.G.R. ENTERPRISES INC., A.G.E. CORPORATION, INC., and others known and unknown to the grand jury, devised and intended to devise a scheme and artifice to defraud the internal Revenue service.

C. THE SCHEME A AND ARTIFICE

1. It was part of the scheme and artifice that beginning in or about October, 1991, defendant JOSEPH CONFORTE directed that Mustang Properties, Inc., was to be sold, and that Peter Ferry was to fly to Italy to meet the buyers, when in truth and in fact the buyers would knowingly be acting at the direction of and for the benefit of defendant JOSEPH CONYORTE in order that he may receive income from the operation of the brothel known as the Mustang Ranch without having to report said income to the Internal Revenue Service and to prevent the Internal Revenue Service from seizing the brothel as the property of defendant JOSEPH CONFORTE

2. It was part of the scheme and artifice that Perry was to meet in Italy with Augustino Conforte, a dentist and nephew of DEFENDANT JOSEPH CONFORTE who was to be a 70% stakeholder in the new company, a surgeon by the first name of Giovanni, who was to be 10% stakeholder, and a shipbuilder by the name of Emanuela Noe,
I the father-in-law to Augustino, who was to be a 10% stakeholder. Peter Perry was to be the remaining 10% stakeholder.

3. It was part of the scheme and artifice that the initials of the first names of the three persons Peter Perry met in Italy would be

the basis of the successor corporate name, A.G.E., which corporation was to be the recipient of all of the properties and income of Mustang Properties, Inc.

4. It was part of the scheme and artifice that defendant EDUARDO NEVES, a retired Varig Airlines employee, would replace Giovanni and would hold as much as 84% of A.G.E. through a British cased company holding company called Portmen Computers, Ltd..

5. It was part of the scheme and artifice that the sale of Mustang Properties was to be in consideration of $3.85 million In Bazil, Switzerland.

6. It was part of the scheme and artifice that no money would actually be exchanged. Instead, defendant JOSEPH CONFORTE caused to be shown to the Swiss notaries who were to witness the transaction, and who worked for an escrow company named Von Bury, a fake bankroll.

7. It was part of the scheme and artifice that the fake bankroll was created by defendant JOSEPH CONTORTS withdrawing approximately $1 million which he had deposited into his Swiss account at Discount Hank and placing the real Swiss paper money on top of bundles of regular paper. These bundles were then wrapped' in cellophane.

8. It was part of the scheme and artifice that the Swiss notaries were told that there was no need to count the money as Peter Perry, representing Mustang Properties, Inc., was present and assured them that all the money was there. Defendant EDUARDO NEVES posed as the buyer representing A.G.E. The sale was then completed.

9. It was further part of the scheme and artifice that, at the direction of JO8EPH CONFORTE, defendant herein, and others acting under his supervision and control, monies from A.G.E."s accounts in the United States would be wired to accounts under the name of MyGrange Ltd., which monies would be then distributed, through a series of off shore corporate accounts, for the use and

benefit of defendant JOSEPH CONFORTE, and that monies from A.E.G.'s accounts made payable to defendant SHIRLEY COLLETTI, as noted below, would inure to the benefit of defendant JOSEPH CONFORTE.

D. THE WIRE COMMTION

On or about the dates, and in the amounts, listed below, in the District of Nevada and elsewhere, JOSEPH CONFORTE SHIRLEY COLLETTI, JOANN OLCESE, EDUARDO NEVES, A.G.E. CORPORATION, INC., ,and A.G.E. ENTERPRISES, INC., defendants herein, and others acting at their direction and under their control, four the purpose of executing and attempting to execute a scheme and artifice to defraud, and for obtaining property by means of false and fraudulent pretenses, representations and promises, did transmit and cause to be transmitted in interstate and foreign commerce, by means of wire, radio or television communication, certain signs, signals, pictures or sounds for the purpose of executing such scheme and artifice, to wit;

COUNT	DATE	AMOUNT	PAYEE
8)	8/4/93	$580,000.00	MyGrange LTD
9)	8/5/93	$ 43,000.00	MyGrange LTD
10)	9/21/93	$180,000.00	MyGrange LTD
11)	10/21/93	$150,000.00	MyGrange LTD
12)	10/25/93	$ 30,000.00	MyGrange LTD
13)	12/29/93	$ 90,000.00	MyGrange LTD
14)	2/3/94	$180,000.00	MyGrange LTD
15)	5/6/94	$270,000.00	MyGrange LTD
16)	7/14/94	$180,000.00	MyGrange LTD
17)	9/9/94	$360,000.00	Shirley Colletti
18)	10/21/94	$200,000.00	Shirley Colletti
19)	11/18/94	$200,000.00	Shirley Colletti
20)	6/16/95	$100,000.00	MyGrange LTD
21)	8/18/95	$300,000.00	MyGrange LTD
22)	9/8/95	$60,000.00	MyGrange LTD
23)	9/22/95	$400,000.00	MyGrange LTD

24)	1012/95	$5,000.00	MyGrange LTD
25)	2/23/96	$200,000.00	MyGrange LTD
26)	4/1/96	$200,000.00	MyGrange LTD
27)	5/8/96	$250,000.00	MyGrange LTD
28)	6/19/96	$200,000.00	MyGrange LTD

All in violation of Title 18, United States Code, section 1343 and Section 2.

COUNT TWENTY-NINE

(Witness Tampering)

In or about January, 1995, in the state and federal district of Nevada, and elsewhere, JOSEPH C. CONFORTE, defendant herein, did knowingly use intimidation and threats, with the intent to hinder, delay, and prevent the communication to a law enforcement officer of the United States of information relating to the commission and possible commission of a Federal offense, namely Wire Fraud (Title 18, United States Code, Section 1343), Bankruptcy Fraud (Title 18, United States Code, Section 152), Money Laundering (Title 18, United States Code, Sections 1956 (a) (1) (A)(I))and 1956 (a) (1) (B) (I) and Racketeering (18 United States Code Sections 1962(c)and (d)), in that Joseph Conforte did tell Peter Perry that he would kill him and members of his immediate family if Perry "talked" about the defendant's activities, which activities were then being investigated by a federal grand jury in the United States District Court for the District of Nevada, and by law enforcement officers of the Federal Bureau of Investigation, the Internal Revenue

Service and Customs.

All in violation of Title 18, United States Code, Section 1512(b)(3).

COUNT THIRTY Guilty
(Participation in an Enterprise Through a Pattern of Racketeering—RICO)

The Racketeering Enterprise

1. At various times relevant to this indictment, JOSEPH CONFORTE JOANN OLCESE, EDUARDO NEVER, SHIRLEY COLLETTI, A.G.E. CORPORATION, INC., A.A.E. ENTERPRISES INC., Mustang Ranch, Mustang Properties, Inc., MyGrange Ltd., and other persons known and, unknown to the Grand Jury, were associated in fact, and constituted a racketeering enterprise (hereinafter "the enterprise") as defined by Title 18, United States Code, Section 1961(4), which enterprise was engaged in, and the activities of which affected, interstate and foreign commerce.

Purposes of he Enterprise

2. The purposes of the enterprise included the following;

a. Enriching the members and associates of the enterprise through, among other things, wire fraud, money laundering, bribery and witness tampering.

b. Preserving and protecting the power, territory and profits of the enterprise through the use of intimidation, and threats of violence.

c. creating national and international corporate shells, including but not limited to A.O.E. ENTERPRISES, INC., and A.G.E. 14 CORPORATION, and by the placement of cooperating officers, agents, and employees, including but not limited to defendants EDUARDO NEVES, JOANN OLCESE and SHIRLEY COLLETTI, for the purpose of generating, collecting, receiving, and holding income, whether reported or unreported to the Internal Revenue Service, from the property known as the Mustang Ranch, and by illegally distributing said income to defendant JOSEPH CONFORTE The enterprise would engage in, and engages in, various criminal activities including wire fraud, money laundering,

bribery, and threats for the purposes of obtaining and distributing said income.

MANNER AND MEANS of the RACKETEERING ENTERPRISE

3. Among the means and methods by which the defendants and their associates conducted and participated in the conduct of the affairs of the enterprise were the following:

a. Members of the enterprise and their associates used, attempted to use, and conspired to use wire fraud.

b. Members of the enterprise and their associates threatened physical violence against various individuals to promote a climate of fear.

c. Members of the enterprise and their associates committed bribery and obstruction of justice to protect and expand the enterprises criminal operations.

d. Members of the enterprise and their associates used, attempted to use, and conspired to commit money laundering.

The Racketeering Violation

4. From on or about September 10, 1982, until the date of this Indictment, in the District of Nevada and elsewhere, JOSEPH CONFORTE JOANN OLCESE EDUARDO NEVEB, A. G. E. ENTERPRISES INC, A.G.E. CORPORATION, INC., and SHIRLEY COLLETTI, defendants herein, and various other individuals known and unknown, beings persons employed by and associated with an enterprise, that is, an association in fact, as set forth in paragraphs 2 through 5 of this Count of the indictment, which enterprise was engaged in, and the activities of which affected, interstate and foreign commerce, knowingly and intentionally conducted and participated, directly and indirectly, in the conduct of the affairs of the enterprise, 'through a pattern of racketeering activity, as that term is defined in Title 18, united states Code, Sections 1961(1) and 1961(5), that is through the commission of

Racketeering Acts One through Ten, as alleged in paragraphs 6 through 14 below.

Pattern of Racketeering Activity

5. The pattern of racketeering activity through which the defendants JOSEPH CONYORTE, A.G.E. ENTERPRISES, INC., A.G.E. CORPORATION, JOANN OLCESE, EDUARDO NEVES and SHIRLEY COLLETTI conducted and participated, directly and indirectly, in the enterprise described above, consisted of the following racketeering acts:

Racketeering Act One— Fraud

6. The defendant JOSEPH CONTORTE, and others known and unknown, did commit and aid and abet the following violations of federal law:

a. Count Three of this Indictment is realleged and incorporated herein by reference as if set forth fully herein, said violation constituting Racketeering Act One.

Racketeering Act Two—Wire Fraud

7. The defendant JOSEPH CONFORTE, and other individuals known and unknown, did unlawfully, intentionally and knowingly commit and aid and abet the following acts, any one of which alone constitutes racketeering act Two:

a. Count Four of this Indictment is realleged and incorporated herein by reference as if set forth fully herein.

b. count Five of this Indictment is realleged and in herein by reference as if set forth fully herein. Racketeering Acts Three and Four—Money Laundering

8. The defendant JOSEPH CONFORTE, and others known and unknown, did unlawfully, intentionally and knowingly commit and aid and abet the following violations of federal law:

a. Count Six of this Indictment is realleged and incorporated herein by reference as if set forth fully herein, said violation constituting Racketeering Act Three.

b. Count Seven of this Indictment is realleged and incorporated herein by reference as if set forth fully herein, said violations constituting Racketeering Act Four.

Racketeering Act Five—Wire Fraud

9. The defendants JOSEPH CONFORTE, EDUARDO NEVER, A.G.E. ENTERPRISES INC., A.Q.E. CORPORATION, JOANN OLCESE, SHIRLEY COLLETTI and others known and unknown, unlawfully, intentionally and knowingly did commit and aid and abet the following acts, any one of which alone constitutes racketeering act Five:

a. Counts Eight through Thirteen of this Indictment are realleged and incorporated herein by reference as if set forth fully herein, said violations constituting Racketeering Act Five.

Racketeering Act Six—Wire Fraud

10. The defendants JOSEPH CONFORTE, EDUARDO NEVES, A.G.E. ENTERPRISES INC., A.G.E. CORPORATION, JOANN OLCESE, SHIRLEY COLLETTI, and others known and unknown, unlawfully, intentionally and knowingly did commit and aid and abet the following acts, any one of which alone constitutes racketeering act Six:

a. Counts Fourteen through Nineteen of this Indictment are realleged and incorporated herein by reference as if set forth fully herein, said violations constituting Racketeering Act Six.

Racketeering

Act Seven-Wire Fraud

11. The defendants JOSEPH CONFORTE, EDUARDO-NEVES, A.G.E. ENTERPRISES 114C., A.G.E. CORPORATION, JOANN OLCEBE, SHIRLEY COLLETTI, and others known and unknown, unlawfully, intentionally and knowingly did commit and aid and abet the following Acts, any one of which alone constitutes racketeering act Seven:

a. Counts Twenty through Twenty-Four of this Indictment are realleged and incorporated herein by reference as if set forth fully herein, said violations constituting Racketeering Act Seven.

Racketeering Act Eight—Wire Fraud

12. The defendants JOSEPH CONFORTE, EDUARDO NEVES, A.G.E. ENTERPRISE'S INC., A.G.E. CORPORATION, JOANN OLCESE, SHIRLEY COLLETTI, and others known and unknown, unlawfully, intentionally and knowingly did commit and aid and abet the following acts, any one of which alone constitutes racketeering act Eight:

a. Counts Twenty-Five through Twenty-Eight of this Indictment are realleged and incorporated herein by reference as if 1A not forth fully herein, said violations constituting Racketeering Act Eight.

Racketeering Act Nine—Witness Tampering

13. The defendant JOSEPH CONFORTE, and others known and unknown, did unlawfully, intentionally and knowingly commit and aid and abet the following violation of federal law:

a. Count Twenty-Nine of this indictment is realleged and Incorporated herein by reference as if set forth fully herein, said violation constituting Racketeering Act Eight.

Racketeering Act Ten—Bribery

14. From at least January, 1992 through at least June, 1996, JOSEPH CONFORTE A.G.E. ENTERPRISES, INC., A.G.E. CORPORATION, JOANN OLCESE, and SHIRLEY COLLETTI, gave, directly and indirectly, compensation to persons executing functions of a public officer of Storey County, State of Nevada, with the intent to influence them with respect to acts, decisions, votes and other proceedings in the exercise of their powers and functions, in violation of Nevada Revised statutes 1.97.020, to wit; monthly payments of $3000.00 were made to a Storey County

Commissioner and monthly payments of $3000.00 were made to a Storey County Sheriff and member of the brothel licensing board.

All in violation of Title 18, United States Code, Section 1962(c).

GUILTY - COUNT THIRTY-ONE

(Conspiracy to Participate in an Enterprise through a Pattern of Racketeering)

1. The allegations contained in paragraphs one through three and five through fourteen of Count Thirty of this Indictment are realleged and incorporated herein.

2. From a time unknown to the Grand Jury, but no later than in or about September 10, 1982, until the date of this Indictment, in the District of Nevada and elsewhere, JOSEPH CONFORTE, JOANN OLCESE, EDUARDO NEVES, A.G.E. ENTERPRISES INC., A. G. E. CORPORATION, INC., and SHIRLEY COLLETTI, defendants herein, being persons employed by and associated with the enterprise, which was engaged in, and the activities of which affected interstate commerce, unlawfully, knowingly and intentionally did combine, conspire, confederate and agree with each other, and with persons known and' unknown to the Grand Jury, to conduct and participate, directly and indirectly, in the conduct of the affairs of the above described enterprise through a pattern of racketeering activity, as defined by Title 18, United States Code, Sections 1961(1) and 1961(5), and as set out in paragraphs six through fourteen of Count Thirty of this Indictment.

3. It was further a part of the conspiracy that JOSEPH CONFORTE, JOANN OLCESE, EDUARDO NEVER, A.G.E. ENTERPRISES INC., A.G.E. CORPORATION, INC., and SHIRLEY COLLETTI, defendants herein, agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the enterprise.

All in violation of Title 18, United States Code, Section 1962(d).

COUNT Thirty-Two

(Money Laundering Forfeiture)

1. The allegations contained in Counts Five and Six of this indictment are hereby repeated, realleged, and incorporated by reference herein for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Section 982 (a)(1). 2. Upon conviction or either Count Five or Six, the defendant JOSEPH CONFORTE, shall forfeit to the United States of America any property, real or personal, involved in such offense, and any property traceable to such property. Such properties include, but are not limited to the following:

a. $1,800,000.00 in United States Currency;

3. If any property being subject to forfeiture pursuant to Title 18, United States Code, Section 982 (a) (1), as a result of any, fact or omission of the defendant -

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property that cannot be divided without difficulty; it is the intent of the United State of America, pursuant to Title 18, United States Code, Sections 982(a)(1) and (b) (1) (A) and Title 21 United States Code, Section 853(p), to seek forfeiture of properties of the defendant up to 21 $1,800,000.00.

All pursuant to Title 18, United States Code, Section 982 and Title 21, United States Code, Section 853(p).

COUNT THIRTY-THREE

(RICO Forfeiture)

Upon conviction on either count Thirty or Thirty one, the defendant(s) shall forfeit to the United States, any interest the defendant(s) have acquired or maintained in violation of Title

18, United States Code, Section 1962; and any interest in, security of, claims against, and property and contractual rights affording a source of influence over, the enterprise, which the defendant(s) established, operated, controlled, conducted, and participated in the conduct of, in violation of Title 18, United States Code, Section 1962, and any property constituting and derived from proceeds, which the defendant obtained, directly or indirectly, from racketeering activity in violation of Section 1962. Such property subject to forfeiture includes, but is not limited to, at least $16,000,000.00, and all interests and proceeds traceable thereto, including but not limited to the following:

(a) All stock, interests in and assets, including accounts receivable, of A.G.E. ENTERPRISES INC., A.G.E. CORPORATION, INC.;

(b) Real property, with all appurtenances and improvements thereon, situated in the State of Nevada, described as follows:

Washoe County:

PARCEL 1:

Commencing at the E 1/4 corner of Section 31, T20N, R20E, M.D.B.&M., and proceeding

THENCE S. 89°28' 38" W. 463.00 feet along the East-West center line of Section 31 to the point of beginning, and proceeding

THENCE S. 27°26'38" E. 238.89 feet, and proceeding

THENCE S. 89'28'38" W. 262.16 feet, and proceeding

THENCE N. 0°31'22" W. 213.00 feet to a point on the East-West center line of Section 31, and proceeding

THENCE N. 89'28'38" E. 154.00 feet along the above mentioned East West center line to the point of beginning.

BEING CONTAINED entirely within the NE G- of the SE ; of Section 31, T20N, R20E, M.D.B.&M.

PARCEL a:

A twenty foot non-exclusive roadway easement, more particularly described as follows:

Commencing at the East quarter corner of Section 31; thence along the Northern line of the South half of said Section 31, South 89°28'38" West 306.75 feet to a point on the Western line of Sullivan Lane, the true point of beginning; thence continuing along said Northern line of the South half of said Section 31; South 89°28'38" West 1171.25 feet; thence South 0°10'00" East 20.00 feet; thence North 89°28'38" East 1181.53 feet to a point on the Western line of Sullivan Lane; thence North 26°26' 38" West 22.43 feet along the Western line of Sullivan Lane to the true point of beginning.

APN: 026-202-02

PARCEL 2:

Portions of Lots 2, 3, 4, and 5 of P.J. KELLY'S RANCH SUBDIVISIONS, according to map filed January 9, 1905, Washoe County Records; being situate within the Northeast one quarter (NE) of the Southeast one quarter (SE ;) of Section 31, Township 20 North, Range 20 East, M.D.B.&M., also being further described as follows: COMMENCING at the East one quarter (E ;) corner of Section 31, Township 20 North, Range 20 East, M.D.B.&M.; 23

THENCE along the Northern line of the South one half(s 1/2) of said Section 31, South 89°28'38" West 306_75 feet to a point on the Western line of Sullivan Lane;

THENCE South 27°26'38" East 260 feet; THENCE South 52•13'38" West 236.88 feet; THENCE along a tangent curve to the right with a radius of 200.00 feet, a central angle of 23°39'09" and an arc length of 47.46 feet to POINT OF BEGINNING;

THENCE continuing along said curve to the right with a radius of 200.00 feet, a central angle of 13°35'51" and an arc length of 82.56 feet;

THENCE South 89°28'38" West 361.39 feet to the Northeast corner of a tract of land conveyed in deed recorded December 26, 1963, Document No. 402654, Washoe County Records;

THENCE South 0°31'22" East 193.22 feet to a point on the Northerly line of Orr Ditch;

THENCE along the Orr Ditch the following courses and distances:

South 85°36'41" East 157.34 feet,
North 77°50'01" East 117.87 feet,
South 85°53'55" East 118.31 feet,
North 79°21'27" East 73.28 feet,
North 59°17'13" East 60.26 feet to the Southwest corner of tract of land conveyed in Deed recorded August 25, 1969, Document No. 151995 Washoe County Records;

THENCE North 24'10'31" West 181.29 feet to the place of beginning.

PARCEL 2A:

A forty foot non-exclusive roadway easement more particularly described as follows:

Commencing at the East quarter of the above mentioned Section 31; thence along the Northern line of the South half of said Section 31., South 89'28'38" West 306.75 feet to a point on the Western line of Sullivan Lane; thence South 27°26'38" East along said last mentioned line 222.99 feet to the true point of beginning; thence on a curve to the right having a central angle of 79°40'16", d radius of 20.00 feet, through an arc length of 27.80 feet; thence South 52°13'38" West 223.84 feet to the beginning of a curve to the right having a central angle of 37°15'00", a radius of 180 feet through an are length of 117.02 feet; thence South 89°28'38" West, 446.37 feet to the beginning of a curve to the right having a central angle of 52°01'15", a radius of 20.00 feet, through an arc, length of 18.16 feet to the beginning of a curve to the left having a central angle of

284°02'30",' a radius of 45.00 feet, through an arc length of 223.09 feet to the beginning of a curve to the right having a central angle of 52°01'15" a radius of 20.00 feet, through an arc length of 18.16 feet; thence North 89'7H'38" East 446.37 feet to the beginning of a curve to the left having a central angle of 37°15'00", a radius of 220.00 feet; through an arc length of 143.03 feet; thence North 5°13'38" East 209.26 feet to the beginning of a curve to the right having a central angle of 100.19'19'44" a radius of 20.00 feet, through an arc length of'35.02 feet to a point on the Western line of Sullivan Lane; thence North 27°26'38" West 81.31 feet to the true point of beginning.

APN: 026-202-09;

C. Real Property situated in the State of Nevada, County of Washoe, described as follows:

The following describes a parcel of land — being contained entirely within a portion of the NW 1/4 of Section 32, T20N, R20E, M.D.B. & M., Washoe County, Nevada, being more particularly described as follows:

Commencing at the section corner common to Sections 29, 30, 31,.and 32, T20N, R20E, M.D.B.&M.

Thence along the line common to the SW ; of said Section 29 and the NW , of said Section 32, S. 88°14'58" E. 1,295.80 feet to a 2" by 2" wooden hub, as shown on Record of Survey No. 324449, as filed for record in the Office of the County Recorder, Washoe County, Nevada;

Thence along the division line as established on said Record of Survey, S. 8°03'58" E. 1,334.31 feet;

Thence S. 6°46'18" W. 267.10 feet to a point of the Northerly line of Wedekind Road;

Thence S. 27°06'51" W. 50.86 feet to a point on the Southerly line of Wedekind Road, also being the true point of beginning;

Thence along the Southerly and Easterly lines of Wedekind Road, also being a transitional right-of-way to North McCarran Boulevard, a Nevada State Highway, the following five (5) courses and distances: S. 87°08'33" W. 136.61 feet, S. 74°22'41" W. 97.11 feet, S. 86°15'48" W. 58.90 feet,

Thence along a curve to the left, the tangent of which bears S. 86°38'15" W. having a central angle of 45°01'18", a radius of 210.00 feet through an arc length of 165.01 feet,

S. 6°47'23" E. 77.56 feet to a point on the Northerly line of North McCarran Boulevard;

Thence Along said Northerly line, S. 87°41'19" E. 425.45 feet to a point on a line as shown on Record of Survey No. 324449, as filed for record in the Office of the County Recorder, Washoe County, Nevada;

Thence along said line, N. 0°14'43" 201.15 feet to the true point of beginning.

APN: 027-041-03;

d. Real property situated in the State of Nevada, County of Washoe, described as follows:

PARCEL 1:

All of the Northeast quarter of the Northwest quarter of Section 15, Township 19 North, Range 21 East, M.D.B. & M., & M., lying Northwest of the railroad right—of-way.

EXCEPTING THEREFROM all those portions on said real property lying within lines parallel and concentric with and 200 feet distant on each side of the centerline of the existing main tract of railroad line.

FURTHER EXCEPTING THEREFROM all that real property described in the deed recorded November 3, 1975, in Book 928, Page 266, under Filing No. 383964, Official Records.

APN: 084-172-01

PARCEL 2:

All of the Northeast quarter of the Northwest quarter of Section *15, Township* 19 North, Range 21 East, M.A.B. &M., lying Southeast of the railroad right-of-way.

EXCEPTING THEREFROM all those portions on said real property lying within lines parallel and concentric with and 200 feet distant on each side of the centerline of the existing main tract of railroad *line*.

FURTHER EXCEPTING THEREFROM all that real property described in the deed recorded November 3, 1975, in Book 929, Page 266, under Filing No. 383964, Official Records.

APN: 084-172-02

PARCEL 3:

The South half of the Southeast quarter of Section 10, Township 19 26

North, Range 21 East, M.D.B.&M., EXCEPTING THEREFROM that portion of said South half of the Southeast quarter, lying

North of the South line of the right-of-way of the Southern Pacific Railroad Co. (Formerly Central Pacific Railway Co.) ALSO EXCEPTING THEREFROM that portion of said South half of the Southeast quarter lying South or the Truckee River.

APN: PORTION OF 084-172-03

PARCEL 4:

The Northwest quarter of the Northeast quarter of Section 15, Township 19 North, Range 21 East, M.D.B.&M., lying North of the Truckee River, EXCEPTING that portion of said Northwest quarter of the Northeast quarter which lies Northwesterly of a line which is parallel with and two hundred feet Southeasterly of the centerline of the main track of the Southern Pacific Railroad

Company's' (formerly Central Pacific Railway Company) reconstructed and now existing railroad.

TOGETHER WITH an easement for ingress and egress and for slope construction as contained in Deed recorded November 3, 1975, in Book 928, Page 266, as Document No. 383964, Official Records.

APN: PORTION OF 084-172-03

PARCEL 5:

The South half of the Southeast quarter of Section 10, Township 19 North, Range 21 East, M.D.B.&M., EXCEPTING THEREFROM that portion of said South half of the Southeast quarter, lying South of the North line of the right-of-way of the Southern Pacific Railroad Co. (formerly Central Pacific Railway Co.)

APN: 084-172-04

PARCEL 6:

A non-exclusive easement for an existing single lane bridge known as the Mustang Bridge with the right to construct, install, inspect, maintain, repair, retrofit, reconstruct and remove said bridge and appurtenances together with a right-of-way therefore and right of ingress thereto and egress there-from, described and conveyed by Easement Deed recorded January 14, 1997 in Book 4765, Page 554, as Document No. 2064025, Official Records;

e. Real property situated in the State of Nevada, County of Washoe, described as follows:

All that certain real property situate in a portion of section 31, Township 20 North, Range 20 East, M.D.B.&M., and being described as follows:

Commencing at a point on the South line of the North one-half (N 1/2) of Section 31, Township 20 North, Range 20 East, M.D.B. & M., , at its intersection with the Westerly boundary of Sullivan

Lane, the true point of beginning: thence along the Westerly line of said Sullivan Lane a distance of 213.40 feet being a point of intersection of the Westerly line of Sullivan Lane with the Southerly line of proposed North McCarran Boulevard, a Nevada State Highway; thence along said Southerly line, the following five courses and distances: Along a curve to the left, having a central angle of 20°58'51", a radius of 1,500.00 feet through an arc length of 549.28 feet; North 86°43'24" West 438.79 feet; thence South 64°21'55" West 262.49 feet; thence South 88°13'32" West 704.01 feet; thence South 82°06'36" West 217.29 feet; thence South 0°18'19" West to a point where such line intersects with the North boundary of the Orr Ditch; thence Easterly along the said Northerly boundary of said Orr Ditch to a point where said Northerly boundary intersects with the South line of the North one-half of said Section 31; thence Easterly along said South line of the North one-half of said Section 31 to the true point of beginning.

EXCEPTING THEREFROM that certain parcel of real property conveyed by EVELYN H. CAPURRO and NOLAN W. GAULT in that certain Map of Dedication for the extension of El Rancho Drive, recorded on the 2nd day of July, 1976, in the Office of the County Recorder of Washoe County, Nevada, being Dedication Map No. 1583.

ALSO EXCEPTING THEREFROM that portion of land known as "McCarran Blvd." transferred to the STATE OF NEVADA in that certain Order of Condemnation recorded July 10, 1980, as Document No. 681821, in Book 1521, Page 320, Official Records.

ALSO EXCEPTING THEREFROM that portion conveyed to the State of Nevada by Deed recorded August 2, 1979, in Book 1415, Page 187, Document No. 621111, Official Records.

APN: 026-013-01;

f. Real property situated in the State of Nevada, County of Storey, described as follows:

Township 19 North, Range 21 East, M.D.H.&M.:
Section 10: The Northeast 1/4 of the Southeast ; and the South of the Southeast ; lying South of the Truckee River.

Section 11: The South ? of the Northwest ; and the Northwest ; of the Southwest ; lying South of the Truckee River and all of the Northeast ; of the Southwest 3,, and the Southwest ; of the Southwest 1/4 .

Section 15: All of the Northeast ; of the Northeast 1/4 and that portion of the Northwest ; of the Northeast, lying South of the Truckee River and the Northeast ; of the Northwest ; lying Southeasterly of the Truckee River.

All that certain portion of the Northwest 4 of the Northeast ; of Section 11, Township 19 North, Range 21 East, M.D.B.&M., lying East of the Truckee River.

EXCEPTING THEREFROM all that portion thereof, lying below the natural ordinary high water line of the Truckee River. TOGETHER WITH an easement for an existing single lane bridge known as the Mustang Bridge and incidental rights thereto as granted the State of Nevada, by instrument recorded January 15, 1997, in Book 113 of Official Records of Storey County, State of Nevada, at Page 237, under Document No. 79377.

ASSESSOR'S PARCEL NO. 4-111-04;

g. Real property situated in the State of Nevada, County of Storey, described as follows:

A portion of the Southwest 1/4 of the Southwest , of Section 16, Township 19 North, Range 21 East, M.D.B.&M., described as follows:

BEGINNING at the Southwest ; of said Section 16, a properly marked stone in place; thence along Section Line North 0°48' East 289.8 feet; thence South 86°14' East for 473.6 feet; thence North 5°26' East, 182.6 feet; thence along South side of a fence and to point on hill, South 86°47' East, 327.0 feet; thence North 3'1' East, 207.4 feet; thence North 56°30' East, 455.2 feet; thence North

58°28' East, 245.34 feet; thence South 1054.2 feet to 1/16 corner on South line of said Section 16; thence North 88°13' West, 1384.8 feet along said Section line to the POINT OF BEGINNING.

EXCEPTING THEREFROM that portion of said land conveyed to the Storey County Treasurer by Deeds recorded March 16, 1983 in Book 37, Pages 284 & 286, Document Nos. 52572 & 52573, Official Records, Storey County, Nevada.

Reference is made to Record of Survey for A.G.E. Corporation filed January 8, 1996 in the Office of the County Recorder of Storey County, State of Nevada, under File No. 77077.

ASSESSOR'S PARCEL NO. 4-121-07; and

h. Real property situated in the State of Nevada,) County of Storey, described as follows:

Parcels B & C, as shown on the' Parcel Map for Henry Bland, being a -portion of Northeast 1/4 of the Northeast ; of Section 20 and a portion of North 1/2 of the Northwest 1/4 of Section 21, Township 19 North, Range 21 East, M.D.B.&M. Filed in the off ice of the County Recorder of Storey County, State of Nevada, on March 16, 1983, under File No. 52574.

EXCEPTING THEREFROM all uranium, thorium and other fissionable material, as reserved by the United States of America in Patent recorded March s, 1951, in Book 63 of Deed Records, Page 187, records of Storey County, State of Nevada, under Document No. 19911.

TOGETHER WITH an easement for a well and water pipeline as described in the agreement made between Joseph Conforte and Joseph and James Peri, recorded June 25, 1974, in Hook 27 of Miscellaneous Records at page 45, under Document No. 37315, and amended by addendum recorded August 15, 1980, in Book 24 of Official Records, at Page 184, under Document No. 47452, records of Storey County, State of Nevada.

ASSESSOR'S PARCEL NO. 4-141-03

I. Restaurant located at 2207 Main Street, Gold Hill, Nevada, and the real property known as 2207 Main Street, Gold Hill, Nevada, legally described as follows:

The land referred to herein is situated in the State of Nevada, County of Storey, described as follows:

Lot 11 1/2- and Lot 12, in Block 6, Range C, as shown on the official map of Gold Hill, Nevada, filed in the office of the County Recorder of Storey County, State of Nevada.

EXCEPTING THEREFROM any portion of the herein described lands lying within the existing public right-of-way for roads and appurtenances thereto.

ASSESSOR'S PARCEL NO. 2-111-01

4. Pursuant to the provisions of Title 18, United States Code, S 1963(m), if any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendants, either:

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the Court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be subdivided without difficulty;

it in the intent of the United States to seek forfeiture of any other property belonging to the defendants up to the value of the above forfeitable property.

All pursuant to Title 18, United States Code, Section 1963. A

TRUE BILL:
DATED this 5th day of August , 1998.

_____
FOREPERSON

_____
KATHRYN E. LANDRETH
United States Attorney
District of Nevada

_____
MICHAEL E. BARR
Assistant United States Attorney
Organized Crime Strike Force

Exhibit 7

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 00-10195 DC NO. CR-95-0049-HDM Nevada (Reno)
v.	
SHIRLEY COLLETTI, Defendant-Appellant	

APPEAL AFTER JURY VERDICT and SENTENCE

The Honorable Howard D. McKibben, presiding

OPENING BRIEF OF THE APPELLANT

Mrs. Colletti didn't know how much money was wired to Mygrange, but Ms. Olcese told her that it was NINE HUNDRED THOUSAND DOLLARS ($900,000.00) per year. (TT 8: 1507-10)

In 1994, Mrs. Colletti transferred SEVEN HUNDRED SIXTY THOUSAND DOLLARS ($760,000.00) to Neves directly in Reno, in the form of three cashier's checks. Knowing Joe Conforte, if the money had been Conforte's, he would never have allowed any one else to take possession of it. (TT 8: 1512-17)

She put the money which Bouvier gave her (the SIX HUNDRED EIGHTEEN THOUSAND DOLLARS ($618,000.00)), box, then transferred the same to Geno Menchetti. She took none of the money, either for herself or for Conforte (TT 8: 1532)

Mrs. Colletti testified she had no knowledge whether Conforte was involved in the setting up the structure of the corporations with Perry in Switzerland. She knew from reading the newspapers that Conforte had difficulties with the I.R.S.. Conforte never discussed this with her. She knew nothing about how and why the corporations were structured. (TT 8: 1543, 1546, 1551)

III. THE SUPERSEDING CRIMINAL INDICTMENT FAILED TO ALLEGE PROSECUTABEL OFFENSE BY MRE. COLLETTI

A. STANDARD REVIEW

This Court reviews a denial of a Motion to Dismiss de novo. United States v. Guzman, 852 F.2d 1117, 1119 (9th Cir. 1988). The criteria to be used in evaluating a challenged indictments are: Does the indictment contain the elements of the offense intended to be charged; Does the indictment sufficiently apprise the defendant of what he must be prepared to meet; and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. United States v. Pheaster, 544 F.2d 353, 360 (9th Cir. 1976), cent. denied, 429 U.S. 1099 (1977).

The court reviews challenges to a district court's ruling denying a motion for judgment of acquittal *de novo.* The test to be applied to a challenge to a district court's ruling in denying a motion for judgment acquittal is the same as the sufficiency of the evidence. That is, the court reviews the evidence presented against the defendant in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. United States v. Freter, 31 F.3d 783, 785 (9th Cir.), cent. denied, 513 U.S. 1048 (1994), and cases cited therein.

Mrs. Colletti filed a Motion to Dismiss containing the essential attack presented here. (ER: 3) After the government rested, she renewed the within attack in the form of a Motion for Judgment with Acquittal per F.R.Cr.P. 29(a). (TT: 1412-29) After both sides rested, she renewed her attack per a Motion per Rule 2129(b). (TT: 1849-50) Mrs. Colletti also filed a post-judgment motion for acquittal per F.R.Cr.P. 29(c) (ER 25: 1430, dk 312, 316) Mrs. Colletti was granted bail based on this Ground.

B. ARGUMENT

The within attack on the Superceding Indictment is framed by several basic principles of law, to wit:

1. An indictment cannot be amended accept by resubmission to the Grand Jury, unless the change is merely a matter of form. Russell v. United States, 369 U.S. 749, 770, 82 S.Ct. 1038, 1050-51, 8 L.Ed. 2d 240 (1962). [reversing conviction] Based upon Russell, courts may not amend indictments to charge a new crime not listed in the indictment through jury instructions. United States v. Pazsint, 703 F.2d 420, 423 (9th Cir. 1983), and cases cited therein. [reversal of conviction] And, based on Russell, an indictment may not be such as to enable a conviction to rest on one point and the affirmance of a conviction to rest on another not considered by the Grand Jury. United States v. Riviera, 837 F.2d 906, 919 (10th Cir. 1988)[reversal of conviction]

2. A defendant who is an accessory after the fact, cannot be convicted as aider and abettor. United States v. Barelli, 407 F.2d 735, 749 (7th Cir. 1969), citing Bollenbach v. United States, 326 U.S. 607, 611 (1946). [reversing conviction] It is simply false to say that a defendant who is a mereaccomplice after the fact, and who did not assist the principal to commit the crime and therefore could not have been supposed to be acting out of a desire that the crime be committed, fits the definition of an "aider and abettor." United States v. Ortega, 44 F.3d 505, 507 (7"h Cir. 1995), citing United States v. Innie, 7 F.3d 840, 852 (9th Cir. 1993), cert. *denied, 511* U.S. 1042 (1994) and other cases.

3. An indictment which charges one as an accessory after the fact must plead both the accessory offense and the completed substantive offense to which the defendant was the accessory. United States v. McLennan, 672 F.2d 239, 243 (19t Cir. 1982), and cases cited therein.

4. One cannot be convicted of aiding and abetting an act which is not unlawful. Shuttlesworth v. City of Birmingham, 373 U.S. 262,265, (1963). Likewise, the commission of the underlying offense is a prerequisite for a conviction as an accessory after the fact. United States v. Innie, supra at 850.

5. The prima facie element of bankruptcy fraud under 18 U.S.C. § 152 is that the individual or corporation is adjudicated a bankrupt, and that the defendant conceals or aids or abets the concealment of the bankrupt's assets from the bankruptcy trustee. United States v. Guiliano, 644 F.2d 85, 87 (2d Cir. 1981). That is, § 152 prohibits false statements and concealment or transfer of assets; no more and no less. United States v. Key, 859 F.2d 1257, 1260 (7th Cir. 1988); Accord: United States v. Weinstein, 834 F.2d 1454, 1461-62 (9th Cir. 1987). The gist of the offense of bankruptcy fraud is a materially false statement under the penalty of perjury made in the proceedings or in relation to the proceedings. United States v. Lindholm, 24 F.3d 1078, 1082-83 (9th Cir. 1994).

6. One who knows nothing of the principal's business affairs or takes no interest in them cannot commit bankruptcy fraud. United States v. White, 879 F.2d 1509, 1511-12 (7th Cir. 1989).

7. Abandonment of a bankruptcy estate constitutes a divestiture of all of the estate's interest in the abandoned property, pursuant to 11 U.S.C. § 554. Once property is abandoned, the abandonment becomes irrevocable. In Re: Gibson, 218 B.R. 900, 904 (E.D. Ark. 1997); In Re: Bryson, 53 B.R. 3, 4 (M.D. Tenn. 1985); 5 Collier on Bankruptcy, 5" Ed., § 554.02[3]. Upon abandonment by the estate, the property reverts to the party with possessory interest thereof. In Re: Wilson, 94 B.R. 886, 888 (E.D. Va. 1989), and cases cited therein.

8. For there to have been a concealment constituting a crime under 18 U.S.C. § 152, a defendant must have been required to disclose his assets through the filing of his schedules and statement of affairs. Where there is no duty to disclose, there is no concealment. 1 Collier on Bankruptcy, § 7.02[l][a][p.7 2423(15th Ed. Rev.)] In Edwards v. United States, 265 F.2d 302, 306 (9th Cir. 1959, this Court held that the offense of concealment under § 152 does not arise until t here is a duty to reveal or disclose. Further, per 11 U.S.C. § 521(1) and Rule 1007(b) of the Federal Rules of Bankruptcy Procedure, the bankruptcy court has authority to extend the time for a debtor to file his schedules, or to relieve him entirely from that duty upon dismissal of the case. See also: 11 U.S.C. § 105. The normal remedy for failure to file schedules in an ongoing bankruptcy proceeding is dismissal of the case. 4 Collier on Bankruptcy, § 521.05[1], p.521-13 (15th Ed. Rev.); 11 U.S.C. 1112 (b) (b) (3).

9. Income tax evasion under 26 U.S.C. § 7201 can include attempts to block collection of an assessed tax (Foreman v. United States, 261 F.2d 181, 183 (9th Cir. 1958)), and evidence of income diversion is admissible to establish income tax evasion, regardless of whether a defendant filed a return. (United

States v. Boone, 951 F.2d 1526, 1540-41 (9" Cir. 1991)). See: United States v. Huebner, 48 F.3d 376', 379-80 (9th Cir. 1994) , cert. *denied,* 516 U.S. 816 (1995) .

10. Where a Chapter 11 debtor-in-possession does nothing with the intent to defeat the provisions of Title 11 of the U.S. Code or in violation of a valid Bankruptcy Court order, he is authorized to conduct business as he sees fit, including acquiring assets. 11 U.S.C. § 353 (c)(1); In re Herberman, M.D., 122 B.R. 273, 278-79 (W.D. Tex. 1990) ; and See: Collier on Bankruptcy (15th ed. rev.), 7.02 (1](a], at 7-23, 24.

Based upon all of the above basic principles of law, it is abundantly clear that the charges against Mrs. Colletti lay on a legal house of cards.

Had the government presented to the Grand Jury an indictment against Mrs. Colletti, either on the theories of being an accessory after the fact to bankruptcy fraud and/or income tax evasion by the Confortes, or aiding and abetting income tax evasion by the Confortes, such would, under the pleaded facts of this case, have been sufficient to have withstood a motion to dismiss.* However, nowhere in the superseding Indictment is either 26 U.S.C. § 7201 or 18 U.S.C. § 3 even mentioned; and, per Russell and its progeny, it would be unconstitutional for this Court to uphold the conviction based upon those offenses.

Instead, in reviewing the superseding criminal Indictment as pertaining to Mrs. Colletti, the Grand Jury charged her with wire fraud and aiding and abetting by realleging and incorporating

[1] In so saying, in no way do we concede that the evidence of aiding and abetting income tax evasion or accessory after the fact to bankruptcy fraud/ income tax evasion would have been sufficient. All we are saying is that those are the crimes that the government should have presented to the Grand Jury before it indicted Mrs. Colletti.

a, b and c of Count IV, (ER 2: 16) which charged a scheme and artifice between Joe Conforte and Peter Perry to defraud the I.R.S. of the Mustang Ranch through the filing of Joe Conforte's Chapter 11 Bankruptcy, the failure to file a statement of assets in said Petition, a claim in both Conforte bankruptcies that Joe Conforte had no interest in Mustang Properties, Inc., when in fact Mustang Properties was his alter ego which Joe Conforte purchased with $1.8 million of his monies. (ER 2: 12-13) Count IV, in turn, realleges and incorporates paragraph 1 through 10 of Count I (ER 2: 11), which alleges bankruptcy fraud and aiding and abetting by Joe Conforte and Perry via the afore-described activities of the Confortes and Perry between November 24, 1982 through February 5, 1991 (the date that Joe Conforte's bankruptcy was dismissed) and May 6, 1992 (the date the Sally Conforte bankruptcy was dismissed). (ER 2: 8-10) Counts VIII through XXVIII allege the scheme and artifice of the sale of Mustang Properties, Inc., to buyers (Agostino, Noe and ultimately Neves) who in fact acted under the direction of and for the benefit of Conforte such that Conforte could receive income from the Mustang Ranch without reporting the same to the I.R.S. and preventing the I.R.S. from seizing the brothel as Conforte's property. (ER 2: 16-17) The Indictment alleges as part of this scheme the "story" of Perry, that it was all of Conforte's monies that purchased the ranch via an alleged "fake bankroll" which wasn't counted, on behalf of A.G.E., and that Conforte directed monies from A.G.E. accounts in the United States to be wired to an account "under the name" of Mygrange, Ltd., which monies were then distributed, through a series of off-shore corporate accounts, for the use and benefit of Conforte. (ER 2: 17-18) Counts VIII through XXVIII then list the 21 wire transfers of monies to Mygrange or to Mrs. Colletti (Counts XVII through XIX). (ER 2: 18-20)

Thus, inextricably intertwined in Counts VIII through XXVIII as alleged, is the notion that Mrs. Colletti aided and abetted the Confortes' bankruptcy frauds, which occurred in 1990-1991, by wiring monies to Mygrange,Ltd., in 1993-1996, which thereby kept both the brothel and the income from the brothel away from the I.R.S.. And Count XXX, or the R.I.C.O. count, per Title 18 U.S.C. § 1961(4), alleges Mrs. Colletti's part in said alleged scheme as the alleged wire frauds of Counts VIII through XIII, XIV through XIX, XX through XXIV, and XXV through XVIII. (ER 2: 24-25) 2

Thus, the "house of cards" becomes evident. First of all, no bankruptcy fraud occurred, because Trustee Coppa-Knudson voluntarily abandoned the income of the Mustang Ranch in the Sally Conforte bankruptcy estate. Once she did so, it did not matter whether the Mustang Ranch was owned by Joe Conforte or by President Clinton! The bottom line is that the true owner was free to do with it as he/she chose. Secondly, it is not bankruptcy fraud to file a Chapter 11 proceeding, refuse to file

'It also alleged as a racketeering act, bribery on the part of Mrs. Colletti; however, that charge was dismissed during trial for lack of proof.

28schedules in spite of an ordered extension of time to do so, and consequently suffer a dismissal of the proceeding. And, it is not bankruptcy fraud for a Chapter 11 debtor-in-possession (i.e., Conforte) to acquire an asset, when there is no violation of a valid court order or concomitant direct misrepresentation of fact to a creditor, in connection with the purchase. Consequently, one cannot either aid and abet or be an accessory after the fact, to non-existent bankruptcy fraud. Thirdly, one cannot aid and abet any crime two-to-six years after the fact and constructively amend the indictment to justify a conviction under 18 U.S.C. § 3 instead of 18 U.S.C. §

2. Thus, the Indictment alleges legal and logical impossibilities central to the Grand Jury's/government's theories of Mrs. Colletti's guilt. This is not mere gamesmanship by Mrs. Colletti's attorneys. A reasonable person in her position, reading this Indictment, would think that what she was being called upon to defend was that she aided and abetted a bankruptcy fraud that caused the income from a valuable asset to end up beyond the reach of a creditor, the United States government, via "wire fraud," by wiring monies two to six years after the fact to offshore holding companies set up under English law, years after the United States government had abandoned the income of the asset. A reasonable person would therefore read this Indictment and assume that the theory of criminality on her part is that what she did in 1993-1996 she knew to be illegal in 1990-1991. In fact, nothing illegal happened in 1990-1991; but even if that were otherwise, a reasonable person would look at this superseding criminal indictment and wonder how it would be possible to enter a time space warp continuum and commit this crime!

IV. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTIONS ON THE CONVICTED. COUNTS OF VIII THROUGH XXVIII.

A. STANDARD OF REVIEW: See above.

B. ARGUMENT:

Even if the government could somehow convince this Court that this Superseding, Indictment gives notice to a reasonable defendant that what she is being charged with is nothing more than 21 straightforward counts of wire fraud per 18 U.S.C. § 1343, the evidence is plainly insufficient to sustain those convicted counts. Whether the charge is mail fraud (18 U.S.C. § 1341) or wire fraud (18 U.S.C. § 1343), the government must prove that the defendant acted with an intent to defraud, that is, an attempt to cause someone an economic loss by deceiving or cheating'. Unite States v. Vaughn, 797 F.2d 1485, 1493 (9th Cir. 1986), and cases cited therein. The

government need not prove that the defendant devised the fraudulent scheme; but it must prove the defendant's willful participation in the scheme with the knowledge of its fraudulent nature and with the intent that these illicit objectives be achieved. United States v. Price, 623 F.2d 587,